I do hereby certify that the above is a correct transcript of the amendments proposed to the bill of exceptions by the defendant's attorney, Mr. Russell, and the rulings of the court thereon and exceptions thereto may be noted.

Dated this 7th day of July, A. D. 1924.

C. M. Davisen, Circuit Judge.

[fols. 162-171] [File endorsements omitted]

IN CIRCUIT COURT OF WASHINTON COUNTY

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS—Filed in Circuit Court July 10, 1924; in Supreme Court July 12, 1924

Whereas, and because the foregoing exceptions, rulings decisions and other matters do not appear of record, I, the undersigned, the Judge before whom the issues were tried, (has) have on due notice considered and allowed the foregoing as a Bill of Exceptions in said cause and I do hereby certify that said Bill contains all the evidence on the trial and all the exceptions taken and all rulings and decisions made in the said case and all the proceedings had therein.

C. M. Davisen, Circuit Judge.

[fol. 172] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ARGUMENT AND SUBMISSION—Feb. 14, 1925

Stipulated in open court that all objection be waived as to Judges who are interested in bank stock, participating in decision.

And now at this day came the parties herein, by their attorneys, and this cause having been argued by J. C. Russell, Esq., City Attorney, and F. C. Stewart, Esq., and Edward M. Smart, Esq., for the said appellant, and by E. W. Sawyer, Esq., J. Gilbert Hardgrove, Esq., and Leon F. Foley, Esq., for the said respondent, and by Franklin E. Bump, Esq., Assistant Attorney General, for the State of Wisconsin, and submitted, and the Court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fols. 173 & 174] IN SUPREME COURT OF WISCONSIN

[Title omitted]

JUDGMENT—April 7, 1925

This cause came on to be heard on appeal from the judgment of the Circuit Court of Washington County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Washington County, in this cause, be, and the same is hereby, reversed, with costs against the said respondent taxed at the sum of Two Hundred Eighteen and 50/100 ($218.50) Dollars.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter judgment in favor of the defendant, dismissing the plaintiff's complaint.

Chief Justice Vinje, Justice Eschweiler and Justice Jones dissent.

[fol. 175] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

Appeal from a Judgment of the Circuit Court for Washington County, C. M. Davison, Judge

OPINION—Filed April 7, 1925

Taxation of shares in national banking associations. This action was begun to recover certain moneys paid by the plaintiff under protest to the city of Hartford as taxes levied upon the shares of stock of the plaintiff national bank. Shares of stock in national banking associations are assessed pursuant to section 70.31, Wis. stats. 1921, printed in the margin. See page 1A.

[fol. 176] Section 70.31—Bank Stock, Assessment

(1) The president, cashier or other officer in charge of any bank, shall make out and deliver to the assessor annually on or before the first day of June a verified statement showing the number and par value of the shares of stock, the names and residence of each stockholder therein on the preceding first day of May and the amount of stock owned or held by him on that day.

(2) All the shares of stock of every bank or banking association whether organized under the authority of any law of this state or of any act of the Congress of the United States shall be assessed and taxed in the assessment district in which such bank is located for the transaction of business.

(3) The shares of stock in any bank shall be liable to assessment and taxation as personal property and shall be entered upon the assessment roll in the names of the several owners, separately from the assessment of other personal property assessable to such owners. The valuation of such shares of stock and the taxes thereon shall be separately entered in the tax roll. (Statutes of Wisconsin, 1921.)

[fol. 177] By the provisions of section 70.39, Wis. stats. 1923, any bank is authorized to pay taxes assessed on its shares of stock for its stockholders at its option. The plaintiff bank exercised its option to pay the amount assessed against the owners of its capital stock under protest and brought this action to recover back the amount so paid.

The case was tried before the court and at the conclusion of the trial the judge made and filed the following findings of fact:

"1. That the plaintiff is, and at the times herein stated was, a National banking corporation engaged in the banking business at Hartford, Wisconsin, with a paid up capital stock of Fifty Thousand Dollars ($50,000) consisting of five hundred (500) shares of the par value of One Hundred Dollars ($100) and all owned by various stockholders of said bank.

2. That the defendant is a city of the fourth class, operating under the general charter law of this state.

3. That during the year 1921 the taxing officers of the defendant city of Hartford, in form assessed and levied a personal property tax for such year on all of the said shares of stock of the plaintiff bank, at the then prevailing tax rate in the assessment district in which said bank is located, to-wit: at the rate of Three and One Hundred Seventy-seven thousandths Dollars ($3.177) on each One Hundred Dollars ($100) of the assessed valuation of such stock, which tax on the whole of said stock amounted to Two Thousand Eight Hundred Fifty-nine and 30/100 Dollars ($2,859.30). That such taxes were entered upon the tax roll of the defendant city for said year and in due time the tax roll for said year with the taxes so in form against said shares of stock, spread thereon, and the warrant for the collection thereof, were placed in the hands of the city treasurer of said city for the collection of said taxes.

4. That said taxing officers of said defendant city did not make any assessment against, or levy any tax for said year, 1921, upon any moneys or moneyed capital in the hands of any individual citizens of said city, or against any debts due or to become due to such individual citizens or against any interest bearing bonds or against any shares of stock in the hands of any of such citizens, in any corporations except banking corporations, but suffered and permitted the same and the whole thereof to be and remain entirely free from assessment, and exempt from taxation for said year, in accordance with the provisions of subsection 10 of section 70.11 of the Wisconsin statutes.

[fol. 178] 5. That during the year 1921 there was a very large amount of moneyed capital in the hands of individual citizens of said city of Hartford, running into many hundreds of thousands of dollars, that was neither assessed for taxation nor taxed, which entered into competition with the banking business, including the banking business of the plaintiff.

That during said year, 1921, there were vast amounts of moneyed capital in the hands of individual citizens of this state, running into millions of dollars that entered into competition with the banking business, that under the provisions of said section 70.11 subsection 10, were wholly exempted from taxation.

That as a result thereof, the shares of stock of said plaintiff bank as well as the shares of stock of other national banking corporations doing business in this state, were taxed or attempted to be taxed at a much greater rate than other moneyed capital in the hands of individual citizens of said city and state, that entered into competition with the banking business, including the banking business of the plaintiff; and the taxation of said shares of stock in said banks, including the plaintiff bank, and the exemption of said amounts of moneyed capital in the hands of individual citizens entering into competition with the banking business, resulted in an unjust, illegal and discriminating tax against said bank's shares.

6. That on February 28, 1922, and while said tax roll and warrant with said taxes in form against the shares of said plaintiff bank so spread thereon, were in the hands of the treasurer of said city for collection of taxes, the said plaintiff in behalf of its stockholders, as well as in its own behalf and interest, paid said tax under protest to the city treasurer of said city, in the sum of Two Thousand Eight Hundred Fifty-nine and 30/100 Dollars ($2,859.30). That at the time plaintiff so paid said tax it accompanied the payment with and said city accepted the same, under a written protest then lodged with said city, stating among other things, that said taxes were unjust, discriminatory and illegally exacted in violation of the federal and state constitutions under menace of compulsion and unjust and oppressive penalties, and further stating that the city treasurer to whom the check for such taxes was given, was authorized to cash the same, only, as an alternative to the resort to distress or other means provided by law for the enforcement of unpaid taxes; that said bank claimed the right and would seek all available means for the recovery of such taxes.

7. That on January 27, 1923, the plaintiff in behalf of itself and its said stockholders, filed with the city clerk of said city, its verified claim in writing against said city for the refund and repayment of the amount of said taxes and interest, a copy of which claim is annexed to the complaint herein.

That on the 16th day of February, 1923, the Common Council of said defendant city, upon consideration of said claim, affirmatively disallowed the same."

[fol. 179] And upon the facts so found, concluded that the tax so levied and assessed against the shares of stock of the plaintiff bank

was unauthorized, illegal and void in its inception, in violation of and repugnant to the provisions of section 5219 of the Revised Statutes of the United States; that the tax had not been voluntarily paid and that the plaintiff was entitled to recover judgment against the defendant city as demanded in the complaint. The findings were excepted to and proper findings were requested to sustain the contention of the defendant, which requests were denied by the court, and to the denial of such requests there were proper exceptions. Judgment was thereafter entered in accordance with the findings of fact and conclusions of law in favor of the plaintiff and against the defendant for the sum of $3,190.84 damages, together with the costs and disbursements taxed at $113.50, from which judgment the defendant appeals.

[fol. 180] ROSENBERRY, J.:

Counsel for the defendant claims that there can be no recovery because there is no showing that the tax levied was in fact inequitable. The contentions of counsel upon this branch of the case fail because if the principal contention made by the plaintiff is sustained, the city of Hartford had no power or jurisdiction to levy an assessment upon the shares of stock of the plaintiff bank and under the provisions of section 74.73 the plaintiff having made payment under protest, it is entitled to maintain an action to recover back any sum paid by it on account of taxes so illegally assessed and levied. It is not claimed that the taxing authorities acted irregularly or in violation of the provisions of the laws of the state of Wisconsin but that there was no authority whatever in the taxing authorities of the city of Hartford to assess and levy the tax in question.

This brings us to a consideration of the principal question raised upon this appeal. This question may be stated in the language of the statute as follows: Are the shares of stock in national banking associations within the state of Wisconsin assessed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state? The solution of this question depends upon the interpretation of section 5219, Revised Statutes of the United States (Act of June 3, 1864, chap. 106; Act of Feb. 10, 1868, chap. 7.) In determining the proper construction and interpretation of that section, some fundamental matters may properly be [fol. 181] adverted to. In the first place, the state of Wisconsin may not tax shares of stock in national banking associations, such associations being instrumentalities of the federal government, except by the consent of the United States. Adams v. Nashville (1877), 95 U. S. 19; Mercantile Bank v. New York (1887), 121 U. S. 138; McCulloch v. Maryland (1819), 4 Wheaton 316.

State taxation of national bank shares was first permitted by act of Congress June 3, 1864 (13 Stats. at Large 99, 112, National Banking Act) subject to the restriction that it should not be

"At a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: Provided, further, that the tax so imposed under the laws of any state upon the shares

of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located." * * *

The act of 1864 was modified and amended by the act of February 10, 1868 (15 Stats. at Large 34) and subsequently became section 5219, Revised Statutes of the United States, and was as follows:

"Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

This section was amended by act of March 4, 1923, chap. 267 (42 Stats. at Large 1499). The facts in this case, however, arose prior to the amendment of March 4, 1923, and it is therefore not [fol. 182] material here except that it is therein provided "that bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business shall not be deemed moneyed capital within the meaning of this section."

The act of 1864 came before the courts almost immediately for construction. See Van Allen v. The Assessors (1865), 3 Wallace 573. It also appears from the Congressional Globe, Part I, 2nd session, 40th Congress, 1867-68, p. 801, that there was difficulty in applying the authority conferred by the act of 1864 in respect to the place where the shares in national banking associations should be taxed. It was this difficulty that led to the revision in this particular of the act of 1864 by the act of 1868. In this connection, however, it is interesting to note that in Lionberger v. Rouse (1869), 9 Wallace 468, the facts in which arose prior to the amendment, it was held that the second limitation in the proviso to the 41st section of the National banking act, which provides that the tax which the section allows the states to impose on the shares held by persons in the said banks, "shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the state where such association is located," referred only to banks of issue created under the laws of the taxing state. For some reason, which is not disclosed, the language last above quoted was dropped from the law

by the amendment of 1868. There appears to have been no discussion of the amendment in that respect.

The purpose of Congress in enacting the statute cannot be more clearly stated than is the language of the Supreme Court of the [fol. 183] United States in People v. Weaver (1879), 100 U. S. 539:

"In permitting the States to tax these shares, it was foreseen—the cases we have cited from our former decisions showed too clearly—that the State authorities might be disposed to tax the capital invested in these banks oppressively.

This might have — prevented by fixing a precise limit in amount. But Congress, with due regard to the dignity of the States, and with a desire to interfere only so far as was necessary to protect the banks from anything beyond their equal share of the public burdens, said, you may tax the real estate of the banks as other real estate is taxed, and *you may tax the shares of the bank as the personal property of the owner to the same extent you tax other moneyed capital invested in your State.* It was conceived that by this qualification of the power of taxation equality would be secured and injustice prevented.

That such was the intent of Congress can admit of no doubt. Have they given expression to that intent so that courts can see and enforce it, or have they expressed themselves so unfortunately that the States may, by a narrow interpretation of the act of Congress and by skilfully framed statutes of their own, exercise the power thus granted so as not only to reap its full benefit, but at the same time cause the burden of supporting the State Government to fall with unequal weight on the subject of taxation thus surrendered to it by the national government?"

It is also plain that it was not the intention of Congress by the enactment of section 5219 as amended to prohibit reasonable exemptions or to interfere with the discretion of the legislatures of the various states in granting exemptions as it existed prior to the enactment of the statutes. Adams v. Nashville (1877), 95 U. S. 19; Boyer v. Boyer (1884), 113 U. S. 689; Mercantile Bank v. New York, (1886), 121 U. S. 138.

If section 5219 as amended were presented without interpretation by the Supreme Court of the United States we should have no difficulty in affirming the judgment of the trial court, for the reason that there are many businesses in which "moneyed capital in the hands of individual citizens" is exempt from ad valorem taxation and the income derived therefrom is taxed, which income tax is in [fol. 184] lieu of other taxes. The statute has, however, been interpreted many times and we are as much bound by the interpretation placed upon it by the Supreme Court of the United States as though such interpretation was included within the language of the statute, especially in view of the fact that Congress adopted the language of the court in the amendment of March 4, 1923. This was an express legislative approval of the interpretation of the court. Camp v. Gress (1918), 250 U. S. 308, 315; Heald v. District of Columbia (1920), 254 U. S. 20.

With the provisions of the federal law in mind, we pass to a consideration of the taxing laws of the state of Wisconsin. From the foundation of the state government down to the enactment of chapter 658 of the Laws of 1911, it had been the policy of the state to levy its general taxes upon property, with the exception of inheritance taxes and license taxes first levied upon railroads and later upon other public service corporations. An amendment to the constitution, authorizing the legislature to impose taxes on incomes, privileges and occupations was approved at the November, 1908 election. The enactment of chapter 658 of the laws of 1911 worked an important and fundamental change in the general taxation policy of the state. See Income Tax Cases, 148 Wis. 456, at 503, et seq. for a full history of the matter. In that case, it was said (p. 505):

"By the present law it is quite clear that personal property taxation for all practical purposes becomes a thing of the past. The specific exemptions of all money and credits and the great bulk of stocks and bonds, as well as of all farm machinery, tools, wearing apparel, and household furniture in actual use, regardless of value, goes far to [fol. 185] eliminate taxation of personal property; while the provision that he who pays personal property taxes may have the amount so paid credited on his income tax for the year seems to put an end to any effective taxation of personal property. That taxation of such property has proven a practical failure will be admitted by all who have given any attention to the subject. Doubtless this was one of the main arguments in the legislative mind for the passage of the present act. By this act the legislature has, in substance, declared that the state's system of taxation shall be changed from a system of uniform taxation of property (which so far as personal property is concerned has proven a failure) to a system which shall be a combination of two ideas, namely, taxation of persons progressively, according to ability to pay, and taxation of real property uniformly, according to value."

When the legislature, in the course of revising the tax laws of the state came to the matter of taxation of shares of stock in national banking associations, it was confronted by the fact that section 5219 authorized an ad valorem tax against stockholders on the shares of stock and on the real property owned by the association and nothing else. Owensboro National Bank v. Owensboro (1899) 173 U. S. 664; First National Bank of Albuquerque v. Albright (1907) 208 U. S. 548. The legislature was therefore compelled to permit capital invested in national bank shares to escape taxation entirely (except upon real estate) or to tax upon an ad valorem basis all moneyed capital in the hands of individual citizens of the state which came into competition with the business of national banks within the rule laid down in Mercantile Bank v. New York (1886) 121 U. S. 138. Its only other alternative was to continue on the old ad valorem basis as to taxation of moneys, credits and personal property which had proven a failure.

Desirous of exercising the power conferred upon it to levy an income tax, the legislature undertook to so classify moneyed capital

[fol. 186] as to bring all moneyed capital in competition with moneyed capital invested in the shares of national banks into one class, taxing all such moneyed capital upon an ad valorem basis and levying a tax upon the income derived from other moneyed capital not so in competition. It was therefore provided by section 70.31 heretofore set out in the margin that shares of all banking companies should be taxed on an ad valorem basis. This classification rested upon the fact that prior to 1911, pursuant to an amendment to the constitution of the State, the laws regulating banks and banking had been thoroughly revised. See chapter 94, Laws of 1911; chapters 220, 221, 222, 223 and 224, Laws of 1923.

Banking was defined as follows (Section 224.02, Wis. stats. 1923):

"The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, copartnership, association, or corporation, shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing, provided that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal." (Wis. stats. 1921 s. 2024, 78-1.)

By the provisions of section 2024-78m, stats. 1911, (sec. 224.03, Wis. stats. 1923) it was made unlawful for any person, copartnership, association or corporation to do a banking business without having been regularly organized and chartered as a national bank, a state bank, a mutual savings bank, or a trust company bank, and a violation of this prohibition was made a misdemeanor. Provisions were created by which any person, firm or corporation theretofore doing a banking business might reorganize as a state bank. Since the [fol. 187] enactment of that law, the banking business of the state has been strictly confined to national banks and corporations organized under the banking laws of the state. The banks, state and national, have a complete monopoly of the banking business and see to it that their privileges in that particular are not infringed upon.

This statute was construed in MacLaren v. State, 141 Wis. 577, where it was held that a person or corporation engaged in the business carried on by banks of deposit or of discount or of circulation is doing a banking business, although but one of these functions be exercised. In that case, Gimbel Brothers, operating a large department store, created a deposit purchase department, accepted money on deposit, issued pass books therefor, and charged the purchases of the depositors against the account, interest being paid upon the deposit and the depositor having an option to withdraw the money on demand with interest. This was held to be in violation of the statute.

That the law has been strictly enforced is indicated by reference to the annual report of the Commissioner of Banking for the year 1918, at page 409, where it is shown that industries attempted to organize a department for the encouragement of thrift and accepted deposits from their employees. This was held to be within the pro-

hibition of the banking act. State building institutions were organized and the controversy never reached this court. In the state of Wisconsin there is no person, firm or corporation receiving deposits, issuing bills or with power to issue bills, or engaged in the business of discount as carried on by banks except those organized [fol. 188] under the banking law of the state *or of the United States*. Building and Loan Associations receive deposits of a limited kind and under certain restrictions that do not apply to banks, state or national. See chapters 215, 216, Wis. stats. 1923.

Since 1911, the state of Wisconsin has had the following general system of taxation: (1st) the general property tax, which includes real and personal property other than moneys, credits and intangibles; (2nd) corporation taxes on public utility companies; (3rd) license taxes on the gross earnings of telephone and insurance companies; (4th) income taxes; (5th) inheritance taxes; (6th) occupation taxes on the operation of coal docks and elevators. The income tax act of 1911 exempted the income of state banks, national banks, mutual savings banks, trust companies, mutual loan corporations, building and loan associations and cooperative corporations or associations organized under chapter 185, from payment of an income tax. All other persons, firms and corporations are required to pay such a tax. The shares in all banking associations of the various kinds hereinbefore described were taxable as personal property, under section 70.31 hereinbefore set out in the margin. The classification established by chap. 658, Laws of 1911, stood without challenge for ten years. Is the tax levied pursuant to this law, which has not been substantially changed, discriminatory under the provisions of section 5219, Revised Statutes of the United States?

At this point we may say that in our consideration of the validity of this legislation, we do not consider ourselves concluded as in an ordinary case by the findings of fact made by the trial court, not only because the findings are general in their terms and present [fol. 189] matters which are mixed questions of law and fact, but for the further reason that the law under consideration is one of state wide application. The court is required to take judicial notice of the general conditions to which the law applies. It is either valid in toto or void in toto. Its validity cannot be made dependent upon a particular finding of fact relating to the conditions in a single locality so that, assuming it to be administered as written, the law might be held valid in one place, void in another, or valid at one time and void at another. State v. Layton, 160 Mo. 74; Pittsburgh C. C. St. L. R. Co. v. Hartford City, 170 Ind. 674; St. Louis v. Liessing, 190 Mo. 464; 1 L. R. A. (N. S.) 918; 20 L. R. A. (N. S.) 461. In this respect this case differs materially from some of the cases heretofore decided by the Supreme Court of the United States.

Nor does our conclusion in any manner rest upon the argument that the income tax is an equivalent or substitute for the ad valorem tax levied upon the stock of national banking associations and in that respect we agree with the conclusion of the New York Court of Appeals in People ex rel. Hanover N. Bank v. Goldfogle, 234 N. Y. 345, and for the reasons there stated. It is to be noted in this connec-

tion, however, that there are not in Wisconsin as there are in the state of New York, private banking institutions.

We have no difficulty in concluding that there was no "hostile intent," "unfriendly attitude" or "unfriendly discrimination" in the enactment of the laws under and by virtue of which the tax in question was assessed and levied on the part of the state of Wisconsin toward national banking associations. National Bank of Welling-
[fol. 190] ton v. Chapman, (1898) 173 U. S. 205, 213.

No doubt if the law is clearly discriminatory, hostile intent would follow as a necessary legal inference, but there is no evidence—in fact there is no claim made in this case—that it exists in fact.

As hereinbefore stated, in the absence of prior authoritative construction of the statute, there would seem to be no difficulty in concluding that shares in national banking associations are assessed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state of Wisconsin where such moneyed capital is entirely exempt from ad valorem taxation and pays only a tax upon its income, but the meaning of the phrase "other moneyed capital in the hands of individual citizens" has been limited.

In Mercantile Bank v. New York, 121 U. S. 138, the decisions of the court down to that time were cited and fully reviewed. We may well begin our consideration of the ultimate question in the case at bar in the light of the conclusions reached in that case. After reciting the purpose of the act of Congress and the policy involved, it was said (we have here as elsewhere italicized the more material parts):

"It was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the States the authority to tax them (national banking associations) within the limits of a rule prescribed by the law. In fixing those limits it became necessary to prohibit the States from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote. The
[fol. 191] business of banking, including all the operations which distinguish it, might be carried on under state laws, either by corporations or private persons, and capital in the form of money might be invested and employed by individual citizens in many single and separate operations forming substantial parts of the business of banking. * * * *The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the Act of Congress is to be read in the light of this policy.*

Applying this rule of construction, we are led, in the first place, to consider the meaning of the words 'other moneyed capital,' as used in the statute. Of course it includes shares in national banks; the use of the word 'other' requires that. If bank shares were not

moneyed capital, the word 'other' in this connection would be without significance. But 'moneyed capital' does not mean all capital the value of which is measured in terms of money. In this sense, all kinds of real and personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. *Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations, are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation, but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which, in the hands of individuals, no one would think of calling moneyed capital, and its business may not consist in any kind of dealing in money, or commercial representatives of money.*

So far as the policy of the government in reference to national banks is concerned, it is indifferent how the States may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all. *Whether property interests in railroads, in manufacturing enterprises, in mining investments, and others of that description, are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks.* There is no reason, therefore to suppose that Congress intended, in respect to these matters, to interfere with the power and policy of the States. The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. *These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of Congress.* That the words of the law must be so limited appears from another consideration; they do not embrace any moneyed capital in the sense just defined, except that in the hands of individual citizens. *This excludes moneyed capital in the hands* [fol. 192] *of corporations, although the business of some corporations may be such as to make the shares therein belonging to individuals moneyed capital in their hands, as in the case of banks.* A railroad company, a mining company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money, and so may be the owners of moneyed capital; but, as we have already seen, the

shares of stock in such companies held by individuals are not moneyed capital.

The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. *It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment.* In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property."

In the Mercantile Bank v. New York case, it was held that trust companies which had power "to receive moneys in trust and to accumulate the same at an agreed rate of interest; to accept and execute all trusts of every description committed to them by any person or corporation or by any court of record; to receive the title to real or personal estate on trusts created in accordance with the laws of the state and to execute such trusts; to act as agent for corporations in reference to issuing, registering, and transferring certificates of stock and bonds, and other evidences of debt; to accept and execute trusts for married women in respect to their separate property; and to act as guardian for the estates of infants," were not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce; that while it is true they receive money on deposit, invest it in [fol. 193] loans, and so deal in money and securities for money in such a way as properly to bring the shares of stock held by individuals therein the definition of "moneyed capital in the hands of individuals," as used in the act of Congress, that nevertheless there was no discrimination where trust companies were taxed as other corporations upon the actual value of their capital stock.

In the same case it was held that although savings banks deposits to the amount of over $400,000,000, were exempt from taxation and that these deposits constitute moneyed capital in the hands of individuals within the meaning of the statute, yet the Court held that it was "clear that they are not within the meaning of the act of Congress in such sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation," for, said the Court: "No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States. * * * However large, therefore may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the

taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation."

In Davenport Bank v. Davenport (1887), 123 U. S. 83, it appeared that a statute of the state of Iowa taxed savings banks on the amount of their paid-up capital but did not tax the shares of savings banks held by individual shareholders and it was claimed that the capital of savings banks could only be taxed by the state by an assessment upon the shares of that capital held by individuals because under the act of Congress the capital of national banks could only be taxed in that way. The court said:

[fol. 194] "It has never been held by this court that the States should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners. *All that has ever been held to be necessary is, that the system of state taxation of its own citizens, of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks.*"

In the Davenport case, the court held that a tax imposed upon the savings bank was in fact equal to that imposed upon the shares of national banks. The doctrine of the Davenport case was affirmed in Bank of Redemption v. Boston (1887), 125 U. S. 60. In this case it was claimed that the tax levied upon national banks compared with the tax levied upon savings banks, pursuant to the laws of the state of Massachusetts, was discriminatory. The court said:

"It is alleged that in Massachusetts savings banks are permitted to transact a banking business in the way of loans upon personal securities, which assimilates them more closely to national banks, and takes away the reason for the application of the rule to them which was applied to the case of the savings banks of New York. But the difference mentioned, if it exists at all, is immaterial; the main purpose of chief object of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the Mercantile Bank. They are substantially institutions, under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase. We adhere to the rule as declared in the cases heretofore decided, which forecloses further discussion as to the present point in this case."

It was also urged that the tax was discriminatory when compared with the taxation upon insurance companies, trust companies, American Bell Telephone Company and the Massachusetts Hospital Life Insurance Company. This objection was held untenable and it was said that the interest of individuals in these institutions is not

[fol. 195] moneyed capital within the meaning of that term as established in the Mercantile National Bank case and that the investments made by the institutions themselves constituting their assets are not moneyed capital in the hands of individual citizens of the state, citing People v. Commissioners, 4 Wallace 244.

In Talbott v. Silver Bow County, (1890), 139 U. S. 438, 448, in commenting upon section 5219, the court said:

"Obviously by this section, as interpreted by the decisions of this court, the limitation applies solely to a parallel with the individual or corporation whose capital in money is used with a view of compensation for the use of the money. And that is the only restriction which, under the agreed statement of facts, demands any consideration. The tax upon a corporation whose capital is invested in manufacturing or transportation cannot, under this section, be placed in comparison with the tax upon an institution whose business is profit on money as money."

In Aberdeen Bank v. Chehalis County (1896), 166 U. S. 440, it was claimed that money invested in corporations or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments and investments in mortgages, came into competition with the business of national banks as other moneyed capital in the hands of individual citizens of the state of Washington. This contention was overruled, the cases were reviewed and substantially that part of the opinion in the Mercantile National Bank case which has been hereinbefore set out was quoted and the court said:

"The conclusions to be deduced from these decisions are that money invested in corporations or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments and investments in mortgages, does not come into competition with the business of national banks, and is not therefore within the meaning of the act of Congress; that such stocks as those in insurance companies may be legitimately taxed on income instead of on value, because such companies are not competitors for business [fol. 196] with national banks; and that exemptions however large, of deposits in savings banks, or of moneys belonging to charitable institutions, *if exempted for reasons of public policy and not as unfriendly discrimination against investments in national bank shares, should not be regarded as forbidden by Section* 5219 *of the Revised Statutes of the United States.*"

It appears that there was taxable moneyed capital in Chehalis county which escaped taxation, amounting to $237,400; that there was unassessed moneyed capital in other portions of the state exceeding $14,000,000; that the moneyed capital invested in banks, national and state, was $11,000,000; and that there was invested in the stocks and bonds of insurance, wharf and gas companies and other moneyed institutions, moneyed capital amounting to at least $26,000,000. The court said:

"As to the sum of $237,400, alleged to be invested by individual citizens of Chehalis County in loans and securities to them payable and owing by other citizens of that county, we are not informed by the bill of the nature of such loans and securities, and, as against the pleader, *we may well assume that they belong to a class of investments which does not compete with the business of national banks.* The same is true of the sum of $14,000,000 alleged to be invested in loans and securities by citizens of the State of Washington and to them payable and owing by other citizens of said State."

This case turns upon the proposition that it did not appear from the allegations of the bill that the moneyed capital was in competition with shares in national banking associations. However, the nature of the loans was disclosed, that is, they were made by citizens of the state to other citizens of the state, from which the conclusion follows that loans made by the citizens of a state to other citizens do not, unless they possess some other quality, compete with the business of national banks.

[fol. 197] In National Bank of Wellington v. Chapman (1898), 173 U. S. 205, it was held that the system of taxation adopted in Ohio was not intended to be unfriendly to, or discriminate against owners of shares in national banks and it was again held that the term "moneyed capital" did not include capital which does not come into competition with the business of national banks. Both the Mercantile National Bank case and the Aberdeen Bank case were cited with approval.

In Amoskeag Savings Bank v. Purdy (1913), 231 U. S. 373, the whole matter of the validity of the New York plan of taxing national bank shares was again under consideration by the Supreme Court of the United States. Again the opinion in the Mercantile National Bank case was quoted at length, prior cases referred to and the court said:

"According to this practical test, it seems to us that the scheme adopted by the State of New York for taxing shares in national banks cannot upon this record be denounced as violative of the limitations prescribed by section 5219, Rev. Stats. The holders of shares in state banks are subjected to precisely the same taxation, and with respect to other competitive institutions, such as trust companies, the franchise taxes imposed upon them apparently result in a substantially similar burden upon the shareholder. Nor is there any discrimination in favor of savings banks. With respect to individual bankers, there is a difference, they being apparently subject to the local rate of taxation and entitled to the privilege of deduction for personal debts; but as they are taxable upon the amount of the capital invested in the banking business, which is normally only such as remains after the deduction of debts, it is not plain that they possess any valuable privilege of reducing the tax assessment by deducting debts. * * * If there be other forms of 'moneyed capital in the hands of individual citizens' of the State employed in a banking or quasi-banking business in competition with the national banks,

and which are subjected to a more favorable rule of taxation, our attention is not called to them. *Moreover, we agree with what was said by the Court of Appeals of New York in the Feitner Case,* 191 *N. Y.* 88, 96, *that 'The State is not obliged to apply the same system to the taxation of national banks that it uses in the taxation of other property, provided no injustice, inequality or unfriendly discrimination is inflicted upon them.'*"

[fol. 198] In Merchants National Bank v. Richmond (1920), 256 U. S. 635, section 5219 Revised Statutes was again before the Supreme Court of the United States for consideration. In that case it appears that the tax was imposed pursuant to an ordinance of the city of Richmond, approved April 9, 1915, and it was claimed that that ordinance was repugnant to the provisions of section 5219, Revised Statutes. This ordinance taken in connection with the general law of the state authorized the imposition for the year 1915 upon bank stocks, state and national, of a tax for state purposes at the rate of 35 cents, a tax for city purposes at the rate of $1.40, a total of $1.75 upon the $100 of valuation, while upon intangible personal property in general, including bonds, notes, and other evidences of indebtedness, the state rate was 65 cents, the city rate 30 cents, an aggregate of 95 cents upon each $100 of valuation. It further appeared without dispute that moneyed capital in the hands of individuals invested in bonds, notes and other evidences of indebtedness came into competition with national banks in the loan market. It appears that in the city of Richmond in 1925, city and state taxes at the rates first mentioned were imposed on national bank stocks to the aggregate value of more than $8,000,000 and stocks of state banks and trust companies to the aggregate value of $6,000,000, and upwards, while taxes at the lower aggregate rate of 95 cents per $100—city tax 30 cents, state tax 65 cents—were imposed for the same year upon bonds, notes, and other evidences of indebtedness aggregating $6,250,000 in value. The Court cited the Mercantile Bank case, the Amoskeag Savings Bank case, and Evansville Bank v. Britton (1881), 105 U. S. 322, and referring [fol. 199] to the rule heretofore quoted from the Mercantile Bank case, the court said:

"No decision of this court to which our attention is called has qualified that rule, or construed section 5219 as leaving out of consideration the rate of state taxation imposed upon moneyed capital in the hands of individual citizens invested in loans or securities for the payment of money, either for permament or temporary purposes, where such moneyed capital comes into competition with that of the national banks. * * * In the present case, there is a clear showing of such competition, relatively material in amount, and it follows that, upon the undisputed facts, the ordinance and statute under which the stock of plaintiff in error was assessed, as construed and applied, exceeded the limitation prescribed by section 5219, Rev. Stats., and hence that the tax is invalid."

There is nothing in the published report to indicate whether the bonds, notes and other evidences of indebtedness aggregating $6,250,000, are held by private banks or other persons. We find nothing in the laws of the state of Virginia which restricts the business of banking to corporations organized under the laws of that state or of the United States and it is asserted in the briefs of counsel that there are in facts a number of private banking institutions within the city of Richmond. Nor is there anything in the published report to indicate definitely what is meant by competition. If the rule laid down in the Aberdeen Bank case is adhered to, it must mean something more than the mere fact that citizens of the state are loaning to each other, for there the allegation of the bill was that $14,000,000 was invested in loans and securities by the citizens of the state of Washington and to them payable and owing by other citizens of said state. The case was even stronger, in Bank of Commerce v. Seattle, (1896), 166 U. S. 463, where the allegation held insufficient to show competition was as follows:

"All of said other moneyed capital referred to was all the moneyed capital in the city owned by resident individual citizens and invested in interest-bearing loans, discounts and securities, except that invested in incorporated banks, located in the city."

[fol. 200] The word "competition" does not appear in section 5219. While the word was not used, the idea was first introduced into the decisions of the court in People v. Commissioners, 4 Wallace 244. The dominant idea of Congress in permitting taxation of national banks was that the right of the states should be so restricted that national banks should not be handicapped by the states. Congressional Globe, Part 2, 1st sess. 38th Congress, p. 1873. The word first appeared in this connection in Mercantile National Bank v. New York, 121 U. S. 138, at 155, where it is said:

"The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unqual and unfriendly *competition*, by favoring institutions or individuals carrying on a similar business and operations and investigations of a like character. The language of the act of Congress is to be read in the light of this policy."

The meaning of the words "moneyed capital" was drawn into question in the House when it had under consideration the amendment of the section in 1868. The Chairman of the Committee on Banking and Currency said:

"My own impression is that they (referring to the words 'moneyed capital') mean capital invested in similar interests,—bank shares of state institutions as they originally existed." Congressional Globe, Part 1, 2nd sess. 40th Congress, 1867-68, p. 803.

The word "competition" has no definition which is inclusive as well as exclusive. (12 C. J. 236 and cases cited.) As ordinarily used, it is

opposed in meaning to monopoly. It involves the idea of struggle between rivals endeavoring to obtain the same thing. As the word is used in the decisions referred to it undoubtedly means that if there is any material amount of moneyed capital engaged in a business which bids against national banks for the business which they are authorized to do, competition exists. Mercantile National Bank of [fol. 201] of Cleveland v. Shields, 59 Fed. 952; First National Bank of Richmond v. Turner, 154 Indiana 456; First National Bank of Nephi v. Christensen, 39 Utah 568.

Therefore, as has been pointed out, shares of stock in railroad companies, mining companies, manufacturing companies, savings banks, building and loan associations, and other corporations although represented by certificate showing that the owner is entitled to an interest expressed in money value, nevertheless these cannot be said to be in competition with moneyed capital invested in national bank shares. 3rd Cooley on Taxation, 4th ed., par. 999 and cases cited.

The testimony upon which the trial court concluded that there was moneyed capital in the hands of individual citizens in Wisconsin, which came into competition with national banks, related principally to loaning concerns and individuals loaning their own funds and may be summarized as follows: Loaning concerns compete with the business of national banks because they withdraw funds from the banks which they use in making their loans. Persons who purchase mortgages, notes and bonds at times withdraw funds from the banks for that purpose. In order to establish a national bank, it is necessary to sell its stock. Somebody has to furnish the money to buy the stock. There is competition therefore in two ways,—competition for capital and competition for money which would ordinarily be on deposit with the bank. If [fol. 202] people, who have funds to invest, invest it in securities other than bank stock, the bank would be hard pressed to obtain capital on which to operate and in that sense they are in competition for capital. We give the language of one witness:

"There is a competition for business between national banks and bonding companies or individuals engaged in selling bonds. That competition might arise in several ways. It might arise directly in that national banks are authorized to buy and sell securities or competition would arise in the money which the two institutions would lend. Investment houses dealing in all kinds of securities would come into competition with such loans, especially in short time loans. The money that is awaiting investment is largely held by individuals and a large part of it on deposit in national banks. When that money is invested it is withdrawn from the banks by the depositor to pay the vendor of the bond."

Upon this testimony rests the conclusion of the trial court that there was competition in fact, but this is no more than the competition which exists when manufacturing and commercial corporations seek capital either for the organization of their business or to aid them in carrying it on after its organization. As has been pointed out, competition of this kind has been repeatedly held not to

be competition within the meaning of that term as used in the construction of section 5219. Investors wishing to purchase dry goods, automobiles, et cetera, withdraw money from banks, but that does not amount to competition in fact. There are no concerns or individuals within the state of Wisconsin, engaged in enterprises in which the capital employed in carrying on its business, is money "where the object of the business is the making of profit by its use as money" except banks. All such persons, firms and corporations are required under the laws of the state of Wisconsin to organize as banks. In this respect, the situation in Wisconsin by reason of its banking laws, is radically different from those in most states, [fol. 203] and one so far as we are able to discover not heretofore dealt with. Minnehaha Nat'l Bank v. Anderson, 2 (2d) Fed. Repts. 897, does not deal with this situation.

We now come to a consideration of moneyed capital within the state of Wisconsin, which is said to be in competition with the shares of national banking associations within the meaning of section 5219.

Building and Loan Associations

In Mercantile Nat'l Bank of Cleveland v. Hubbard (1899) 98 Fed. 465, the court said:

"It seems to me that building associations are certainly not to be differentiated in their purpose or object, or practical effect, from savings banks, and that capital invested in them, though subject to a somewhat different rule of taxation cannot be regarded as moneyed capital in competition with the moneyed capital in national banks, any more than is capital invested in savings banks. The chief object of building associations is to encourage the building of small houses by poor people, and the saving from their earnings, week by week, of an amount sufficient to pay the mortgage debts incurred in the purchase of the land and the construction of the house."

While this case was reversed on appeal (105 Fed. 809), the reversal was upon an entirely different point. See also Consolidated Nat'l Bank v. Pima, 48 Pac. 291; First Nat'l Bank v. Dawson, 213 Pac. 1097; People v. Goldfogle, 205 N. Y. Sup. 870.

Brokers and Dealers in Bonds, Mortgages, and Securities

These are not in competition with national banks because national banks are not by law authorized to carry on the business of trafficking or dealing in mortgages, bonds or securities. While they may buy and sell mortgages, bonds and securities as an incident to their [fol. 204] principle business, they are not in any proper sense of the term dealers in such securities. People v. Goldfogle, 205 N. Y. Sup. 870; Morse on Banks & Banking, 5th ed. vol. 1, secs. 59, 71, 77; Nat'l Bank vs. Mayor of Baltimore, 100 Fed. 24 (C. C. A.); Corn Exchange Bank v. Kaiser 160 Wis. 199; Grand Forks Bank v. Anderson, 172 U. S. 573.

In Talbott v. Silver Bow County, 139 U. S. 438, the court said:

"Obviously by this section (sec. 5219) as interpreted by the decisions of this court, the limitation applies solely to a parallel with the individual or corporation whose capital in money is used with a view of compensation for the use of the money." See also Palmer v. McMahon, 133 U. S. 660.

In Minnehaha Nat'l Bank v. Anderson, 2 (2d) Fed. Repts. 897, the restricted power of national banks to act as brokers is wholly ignored. National banks do not use their capital as a "rotating fund" in the purchase and sale of securities.

Dealers in bonds, mortgages and securities do not derive their profit except in a slight degree from accruing interest. Their objective is a profit by resale at an advanced price. They are merchandisers of securities and not bankers in any proper acceptation of that term. They are not in Wisconsin permitted to use the words "bank", "savings bank", "banker", or the plural thereof upon any office sign or on any letter head or other written or printed matter. Section 221.49, Wis. stats.

Acceptance Companies

The business conducted by these companies, at least in this state, is of comparatively recent origin. Dealers in automobiles, motor trucks, motorcycles, vacuum cleaners, electric washing machines, pianos, talking machines and other articles make sales on the install- [fol. 205] ment plan, taking notes or so-called acceptances in the nature of conditional sales contracts. Acceptance companies buy these contracts and in the transaction of their business are usually heavy borrowers from the banks. Their business more nearly corresponds to that of a pawnbroker or a chattel mortgage broker than of a bank.

In People v. Goldfogle, 205 N. Y. Sup. 870, the court said:

"Bankers' Commercial Securities Co., Inc., purchases from dealers, who buy from manufacturers, condition sale contracts, leases, and chattel mortgages on automatic piano players, calling for weekly or monthly installments over an average period of 30 months; the payments average about $12.50 a month on each transaction. This is not the acquisition of evidences of indebtedness, which 'normally enter into the business of banking.'" Citing Merchants Nat'l Bank v. Richmond, 256 U. S. 635, 639.

The very fact that these companies have come into existence to meet a situation created by the increasing amount of sales made upon conditional sales contracts not acceptable to banks is indicative of the fact that they are doing a business not in competition with that done by banks. There is a wide gap between securities of this character and the ordinary commercial paper accepted by banks in the usual course of their business.

87

Dealers in Foreign Exchange

Inasmuch as the only showing of competition in this field is that done by the express companies, which are under the laws of the state a public utility and therefore assessable on an ad valorem basis, we shall not further consider this subject, it not being made to appear in any way that the moneyed capital invested in these companies is assessed at a lower rate than the shares in national banking associations are assessed.

[fol. 206] Investments of Individuals in Bonds, Mortgages, and Securities

It appears from the evidence and is a fact known to everyone that in the state of Wisconsin there are many individuals who loan their own money upon real estate mortgages, bonds and other interest bearing securities in lieu of depositing the same in banks or investing in stocks or other forms of investment. Investments thus made by individuals can at best come into competition with the business done by national banks only in a limited and remote way. Banks deal principally in commercial paper and can take real estate loans of but a very limited class. By section 24 of the federal reserve act, national banks are authorized to make loans within a radius of one hundred miles upon farms, for not more than five years; upon other real estate for not more than one year, at not exceeding fifty per cent of the actual value of the property offered as security, the aggregate of which loans cannot exceed twenty-five per cent of the capital and surplus or one-third of the time deposits of the bank, whichever is greater. No person can accept deposits or do anything approaching a banking business under the law of this state. Loans made by individuals upon real estate or investments made by them in bonds, are in no practical way, to any extent, in competition with the business of national banks. Individual investors handle a very large class of loans which national banks are by law forbidden to deal in.

In the Mercantile Nat'l Bank case, it was held that investment in municipal securities are not in competition with national banking associations. The court said:

[fol. 207] "Such securities undoubtedly represent moneyed capital, but as from their nature they are not ordinarily the subjects of taxation they are not within the reason of the rule established by congress for the taxation of national bank shares."

We cannot believe that these incidental investments made from the savings of individual citizens come within the term "moneyed capital" in competition with similar capital invested in the shares of national banking associations however large in the aggregate amount they may be. While they more closely approximate competitive moneyed capital than any other form of moneyed capital in this state, they are not made as a business but simply as one form of investment. If a deposit in a savings bank is not competitive

moneyed capital, how does it become competitive when it is drawn out and invested in a mortgage? This situation was, however, presented and ruled upon in the Bank of Aberdeen case, where it appeared that there were millions of dollars loaned by citizens in the state to other citizens upon notes, bonds and mortgages, but that fact was held not to be sufficient to show competition. No more is shown in this case. In that case as here the money was no doubt withdrawn from banks for the purpose of investment and after its investment no doubt found its way immediately back into the banks. Transactions of that sort are not employing moneyed capital in a business nor is it the kind of competition which must result in the classification of capital thus held with moneyed capital invested in national bank shares. Such inequality as may exist under our taxing law is accidental and not an intentional or a systematic discrimination. First Nat'l Bank v. Albright, 208 U. S. 548, 552.
[fol. 208] Our conclusion in this respect is strengthened by the language of the act of March 4, 1923. It is there provided that "bonds, notes or other evidence of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

If the investments of individuals made not as a business but for the purpose of investing their own funds are held to be competitive within the meaning of section 5219 before the amendment, they must fall in the same category thereafter, for by the amendment they must "not be made in competition with such business." Without attempting to define what is meant by competition, the word was no doubt used by Congress in the act of 1923 in the same sense in which it was used in the Mercantile National Bank case and Merchants Nat'l Bank v. Richmond case. Congress must have meant to do something by the amendment. If the term "competition" is defined as plaintiff's claim it should be, the amendment would be futile as applied to the situation existing in this state.

It is considered upon the whole case therefore that the tax assessed and levied was a legal tax and that the law of the state of Wisconsin authorizing it is a valid law and within the consent conferred by section 5219, revised Statutes of the United States, upon the State of Wisconsin, for the following reasons:

(a) There is in fact no unfriendly discrimination or hostile attitude on the part of the state of Wisconsin toward national banks.

(b) The law is not in fact discriminatory, does not in fact operate oppressively or harmfully, as is shown by the fact that national banks are prosperous.

(c) All persons, firms and corporations doing a banking business [fol. 209] are required to organize as banks and so become taxable as national banks are taxed. There is no business conducted within

the state which is in direct competition with national banks not taxed as national banks are taxed.

(d) Moneyed capital in the hands of individual citizens, invested in mortgages and securities for their own personal benefit, does not in fact compete as a business with moneyed capital invested in shares of national banks for the business which national banks are authorized to do. If there is any competition as to loans, such competition is within such a narrow and restricted field and so inconsequential in amount as not to be in fact discriminatory within the decisions already cited.

(e) The Mercantile Nat'l Bank v. New York case, supra, is not overruled or modified by Merchants Nat'l Bank v. Richmond, supra, but is reaffirmed by it so far as the construction of section 5219 is concerned. The fact that moneyed capital in the hands of individual citizens came in competition with national banks was established in that case without dispute and the rule laid down in Mercantile Nat'l Bank v. New York case was applied. That fact does not appear in this case.

(f) There is no moneyed capital in the hands of individual citizens of Wisconsin bidding for the business which national banks are authorized to do. Such restricted and incidental competition as there is is insignificant in amount and works no "discrimination unfavorable to the holders of shares of the national banks."

[fols. 210 & 211] By the COURT: Judgment appealed from is reversed and cause remanded with directions to the trial court to enter judgment in favor of the defendant, dismissing the plaintiff's complaint.

The following Justices dissent: Chief Justice Vinje, Justice Eschweiler, Justice Jones.

[fol. 212] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

DISSENTING OPINION—Filed April 13, 1925

VINJE, C. J., dissenting:

The court states that the crucial question raised upon this appeal is as follows: "Are the shares of stock in National Bank Associations within the state of Wisconsin assessed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state?" This seems to me to be a misconception of the principal question in the case for it is a conceded fact that the bank stock in question was assessed at over three per cent while

had it been assessed as other moneyed capital in the hands of private individuals of the state, namely, upon an income basis or an equivalent thereof the assessment would have been less than one per cent. Indeed, it was frankly conceded upon the oral argument by the state, as intervener, and by the city of Hartford that the bank stock was assessed at a much higher rate than was moneyed capital in the hands of private individuals of the state and that the rate was discriminatory if it came within the prohibition of the statute as construed by the federal Supreme Court. The justification sought [fol. 213] upon the argument, and the justification sought by the opinion of the court, is that there is in the state of Wisconsin outside of state banks and trust companies, which are assessed at the same rate as national banks, no moneyed capital in the hands of private individuals that comes in competition with the business of national banks. This is the basic ground for the conclusion reached by the court. Further on in the opinion it is stated "There are no concerns or individuals within the state of Wisconsin engaged in enterprizes in which the capital employed in carrying out the business is money 'where the object of the business is the making of profit by its use as money' except banks." It seems to me that trust companies might well have been included in the exception in as much as they are taxed the same as banks, and perform to a large extent the function of banks, and, for my purpose I shall assume that trust companies were intended to be included in the exception. My difficulty comes not so much in construing the federal decisions as the court construes them but in arriving at the conclusion upon the evidence in this case, and upon what may be taken judicial notice of, that there is no moneyed capital in the hands of private individuals in the state of Wisconsin that comes in competition with the business of national banks. The undisputed evidence in the case shows that there is such competition so far as the plaintiff bank is concerned. The taxing officer and the state introduced no evidence to rebut that which the bank offered, so that the testimony in the case is undisputed except in so far as it may be in conflict with facts of which the court may take judicial notice. Mr. Liver, the president of the bank, who had been such for seventeen years [fol. 214] past testified among other things that there were four business concerns in the city of Hartford engaged in the loaning business and that he knew that these four concerns had loaned out about $250,000 or $300,000 a year and that such facts were true as to the year 1921. He further testified that these loaning concerns "compete with the business of the bank in that respect the same as other banks would be in competition." He further states in answer to a question as to whether the same conditions obtain generally throughout the state, that, judging from his experience and connection with five groups of Wisconsin bankers' associations "the situation is the same. The amounts in some localities are very large of course. The effect is the same all over. I am familiar with the banking business and I have attended a great many bankers' conventions. I know the Ziegler Company. Its home office is at West Bend. It is engaged in the real estate and loan business. It does

a large amount of business in this city. It has an agency at Hartford. They circularize their loans and solicit in many ways. I know of large loans they have made that run up into thousands of dollars and the situation I testified to competed with the business of the First National Bank applied in 1921 as well as it does at the present time. There is no change in the situation." I agree with the statement of the court that it "is required to take judicial notice of the general conditions to which the law applies. It is either valid in toto or void in toto. Its invalidity cannot be made dependent upon a particular finding of fact relating to the conditions in a single locality. So that assuming it to be adminis- [fol. 215] tered as written the law might be held valid in one place and void in another or valid at one time and void at another." The difficulty I have is in disregarding the testimony in the case as applied to the particular locality of Hartford, a city containing a little more than four thousand inhabitants, and in coming to the conclusion that the testimony given with reference to the conditions in that locality do not obtain in other cities in the state containing an equal or larger population. It seems to me that the uncontradicted testimony of the president of the plaintiff bank that there are a number of loan companies in the city of Hartford that come in direct competition with the loaning business of the First National Bank is in accordance with facts generally known to exist in the banking and loaning business and that it is quite probable as he says, that the condition existing in his locality obtains throughout the state. Indeed, it may be safely said that in larger cities the amount of money loaned by loaning companies in all probability exceeds the amount per capita in the smaller cities. We have one city containing nearly one half million inhabitants in which there is an immense amount of wealth and in which a large number of loaning companies are doing a profitable business. We have in the state of Wisconsin and did have in 1921 over fifty cities containing a population of more than four thousand people each and in the aggregate a population exceeding one million and a quarter. If we take this condition into acount and assume that an equal amount of money is loaned in these urban localities, omitting altogether suburban and agricultural districts, we find that over ninety million dollars in loans would be made in these urban localities [fol. 216] throughout the year. Inasmuch as it is a fact that in the state of Wisconsin at least seventy five per cent of the net income of National Banks is obtained from loans it seems natural to conclude that the vast amount of loans made by these loaning companies comes in sharp competition with the main gainful business of national banks in this state. The conclusion reached by the court is that outside of state banks and trust companies there is no moneyed capital in the hands of private individuals that comes into competition with the busines of national banks. It is conceded that there must be a substantial competition to some substantial part of the bank's business; that the federal statute was not intended to make a law invalid where it merely in some minor degree in a minor way may be discriminatory. It is also conceded that the law

be construed, prior to its amendment by Congress in 1923, as it was then amended, namely, that this competition must come through some regular permanent business channel and not through individual loans made by individual citizens for their own benefit only, although from some expressions in the decision of the Supreme Court of the United States it may be doubtful that the act prior to its amendment should be so construed. As I interpret the situation the court has come to the conclusion that there is no moneyed capital in the hands of private individuals in this state that comes in substantial competition with a substantial part of a national bank's business because in a number of federal cases the evidence showed that as to a particular locality a particular class of moneyed capital in the hands of private individuals was found not to come in competition with the business of a national bank. It is one thing to say that as to a particular locality this class or that class or several classes of moneyed capital in the hands of private individuals [fol. 217] did not come into competition with a national bank situated in that locality. It is quite another thing to come to the conclusion that national banks in the state of Wisconsin have no competition from all classes of moneyed capital in the hands of private individuals within the whole state. Herein lies my disagreement with the result of the court. We all, I think, construe the federal decisions alike. But I am unable to reach the conclusion that under the federal decisions the evidence in this case together with the facts of which we may take judicial notice can sustain the conclusion that there is no competitive moneyed capital in the hands of private individuals in the state of Wisconsin.

It seems to me quite plain that Congress when using the term "other moneyed capital in the hands of private individuals" meant something besides money in state or private banks or trust companies. If those were the only classes of capital Congress had reference to it would have been easy to have so stated in the law especially in the amendment of 1923. But we find there the identical phraseology retained and it seems to me that from that fact it cannot be said that Congress was of the view that in any one state such as Wisconsin no other moneyed capital in the hands of private individuals could or did come in competition with national banks except state banks, trust companies or private banks. I cannot escape the conclusion that by using the phrase "other moneyed capital in the hands of private individuals" it was intended to include all forms of moneyed capital where money as such was used as capital for the purpose of making a gain or profit, and that whenever a busi- [fol. 218] ness of that kind conducted by an individual or by a partnership or otherwise came in direct competition with a substantial part of the business of a national bank it was included in the condemnation of the statute. Where, as here, our law taxes loaning companies less than one-third of what it taxes national banks for doing the same kind of business it seems to me that it must be said that the law is discriminatory and comes within the condemnation of the federal statute. It is idle to say that national banks have prospered in the past under our system of taxation. That

is not the question. The question is, does our system of taxation operate to discriminate against national banks as compared with other moneyed capital engaged in the same or like business? Of course it goes without saying that private individuals in our state cannot engage in all the kinds of business that a national bank engages in, because private individuals in our state cannot do a private banking business without being organized as state banks and thus coming within the same class as to taxation. But as was said in the Mercantile Bank v. New York, 121 U. S. 139, a part of the legitimate business of a national bank is "the discounting of commercial paper, making loans of money on collateral security and negotiating loans dealing in bonds, etc." Now it is a well known fact that in our state there are numerous private individuals and partnerships and corporations that can and do engage in this class of business just mentioned which is a part of the business of a national bank and the money invested in such enterprises runs into the millions of dollars and the business transacted by them runs into the hundreds of millions of dollars annually.

[fol. 219] The crux in this case is whether or not there is moneyed capital in the hands of private individuals of this state that comes in competition with the business of national banks or any substantial part thereof within the meaning of the federal statute as construed by the Supreme Court of the United States. The case of Merchants National Bank v. Richmond, 256 U. S. 635 is the latest expression we have upon this question from the federal Supreme Court. In that case it was found that there was money to the extent of upwards of twenty million dollars coming into competition with the business of national banks and as the court said "By repeated decisions of this court dealing with the restrictions here imposed it has become established that while the word 'moneyed capital in the hands of individual citizens' do not include shares of stock in corporations that do not enter into competition with the national banks, they do include something besides shares in bank corporations and others that enter into direct competition with those banks. They include not only money invested in private banking properly so called but investments of individuals in securities that represent money at interest and other evidence of indebtedness such as normally enter into the business of banking." And further on it is said that this "moneyed capital" "included money in the hands of individuals employed in a similar way invested in loans or in securities for the payment of money either as an investment of a permanent character or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is generally known as personal property." It would seem [fol. 220-224] to be clear from this expression of opinion that it was the idea of the federal Supreme Court that the competitive moneyed capital spoken of in the statute was not limited to the competitive moneyed capital of a bank or even of a trust company but that it might be competitive though in the hands of private

individuals and though doing only a part of the business which the business of a national bank transacts.

My conclusion is that not only does the undisputed testimony show that there was moneyed capital in the hands of private individuals in large amounts coming in direct competition with the loaning business of the plaintiff bank but that in my judgment taking into account the business of national banks within the state as transacted and the business of loaning and bonding companies and other private businesses in which money is used as capital for the purpose of making a profit thereon, that it can be said that there are hundreds of millions of dollars in this state that come in direct competition with some form of the business transacted by national banks and therefore it is contrary to the federal statute to tax the national banks over three times as much as these other private businesses are taxed. For the reasons stated I am unable to concur in the view of the majority of the court, and in my opinion the judgment of the trial court should have been affirmed.

I am authorized to state that Mr. Justice Eschweiler and Mr. Justice Jones concur in this dissenting opinion.

[fol. 225] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—June 22, 1925

The court being now sufficiently advised of and concerning the motion of the said Respondent for a rehearing in this cause, it is now here ordered and adjudged by this court that said motion be, and the same is hereby, denied, with $25.00 costs and costs of motion.

[fol. 226] IN SUPREME COURT OF WISCONSIN

[Title omitted]

CLERK'S CERTIFICATE

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause

That the original writ of error, the petition therefor and order allowing the same, the citation with its service endorsed thereon, the assignment of errors, certificate of lodgment and a copy of the bond

are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 23rd day of July, A. D., 1925.

Arthur A. McLeod, Clerk of Supreme Court Wisconsin. (Seal of Supreme Court of Wisconsin.)

[fol. 227] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed Aug. 10, 1925

It is stipulated by and between the plaintiff in error and the defendants in error, by their respective attorneys, that the following portions of the Record, which counsel believes sufficent to show the errors complained of and to present to the court the questions arising in this proceeding, shall be printed:

It is further stipulated and agreed that if any necessary part of the Record be not thus printed, that the plaintiff in error has the right to print or may be required by the defendants in error to print any further or additional portions thereof. This is without prejudice to either party, the cause being for hearing and determination as though the whole Record were printed in full and at length.

Plaintiff in error hereby states in pursuance of Rule Eleven of the United States Supreme Court that it intends to rely on each and all of the errors set forth in the Assignment of Errors in this cause.

Dated this 4th day of August, 1925.

Geo. R. Miller, Edwin S. Mack, Arthur W. Fairchild, J. G. Hardgrave, E. W. Sawyer, Attorneys for Plaintiff in Error. [fols. 229 & 230] Herman L. Ekern, Attorney General of the State of Wisconsin; Franklin E. Bump, Asst. Attorney General of the State of Wisconsin; J. C. Russell, Attorney for the City of Hartford; Edward M. Smart, of Counsel & Atty. for City of Hartford, Attorneys for the Defendants in Error.

[fol. 231] [File endorsement omitted.]

Endorsed on cover: File No. 31,359. Wisconsin Supreme Court. Term No. 636. First National Bank of Hartford, Wisconsin, plaintiff in error, vs. City of Hartford. Filed July 27th, 1925. File No. 31,359.

Brief For Plaintiff In Error

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 186

FIRST NATIONAL BANK OF HARTFORD, WISCONSIN,
PLAINTIFF IN ERROR,

vs.

CITY OF HARTFORD AND STATE OF WISCONSIN,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

GEO. P. MILLER, EDWIN S. MACK, ARTHUR W. FAIRCHILD, J. GILBERT HARDGROVE,
Counsel for Plaintiff in Error.

E. W. SAWYER,
Of Counsel.

SUBJECT INDEX.

SUBJECT INDEX—Continued.

TABLE OF CASES.

TABLE OF CASES—Continued.

FEDERAL STATUTES.

WISCONSIN STATUTES.

VIRGINIA STATUTE.

INSERT

Note. The jurisdiction of this Court was so clearly settled and the question involved was so narrow that in writing the brief we overlooked the requirement of a statement on jurisdiction and an abstract of the assignment of errors. They are here set forth.

CLAIMS AND RULINGS.

While not so designated in any heading, these are covered by pages 2 to 7, infra.

JURISDICTION.

Jurisdiction in this case rests on Section 237 of the Judicial Code as amended by the Act of February 13, 1925, and is sustained by the following decisions:

Merchants' National Bank vs. Richmond, 256 U. S. 635, 637.

First National Bank of Guthrie Center vs. Anderson, — U. S. — (not yet officially reported), 46 Sup. Ct. 135.

ASSIGNMENT OF ERRORS.

The Supreme Court of Wisconsin erred:

(1) In holding that the Wisconsin bank stock tax *statutes,* in so far as the same provided for the assessment and taxation of shares of stock in national banks, while they exempted all other moneyed capital, were valid laws and within the consent conferred by Section 5219 and in refusing to hold that the same were invalid because *repugnant to the Constitution of the United States and to Section 5219;*

(2) In refusing to hold that said *statutes* were invalid on the ground that they *operated to deprive the plaintiff in error and its shareholders of the right and privilege of immunity* from taxation by the state otherwise than in the manner and to the extent permitted by Section 5219, to which as an agency of the National Government it was entitled;

(3) In holding the *tax* to be legal and in refusing to hold it illegal and void because *repugnant to the Constitution and to Section 5219;*

(4) In refusing to hold the *tax* illegal and void on the ground that it *operated to deprive the plaintiff in error and its shareholders of the right and privilege of immunity* from taxation set out at (2), supra.

(5) In holding it to be a matter of common knowledge that there was no moneyed capital within the state or within the city during the year in question coming into competition with the business of national banks notwithstanding the undisputed evidence and the findings of the trial court amply sustained thereby to the contrary;

(6) In reversing the decision of the circuit court and directing the entry of judgment dismissing the complaint of the plaintiff in error for the recovery of the taxes so illegally assessed, levied and collected (R. pp. 7 to 9).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 636

FIRST NATIONAL BANK OF HARTFORD, WISCONSIN,
PLAINTIFF IN ERROR,

vs.

CITY OF HARTFORD AND STATE OF WISCONSIN,
DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF FOR PLAINTIFF IN ERROR.

This case is pending on writ of error to the Supreme Court of Wisconsin to review a judgment of that court reversing a judgment of the Circuit Court for Washington County, Wisconsin, and directing the lower court to enter judgment dismissing the complaint in a suit for the recovery of taxes levied against shareholders of the First National Bank of Hartford, Wisconsin, the plaintiff in error, for the year 1921, claimed by the Bank to be illegal because repugnant to Section 5219 of the Revised Statutes of the United States, and paid under protest.

Judgment in Circuit Court February 7, 1924, for $3,190.84 damages and $113.50 costs (R. 20).

Reversed in Supreme Court with directions to dismiss, after argument had February 14, 1925, opinion filed April 7, 1925, and ruling on motion for rehearing on June 22, 1925 (R. 68). Officially reported as follows:

First National Bank of Hartford vs. Hartford, 187 Wis. 290.

STATEMENT OF THE CASE.

The plaintiff in error, the First National Bank of Hartford, Wisconsin, hereinafter referred to as the "Bank", is a national banking association engaged in business at Hartford, Wisconsin, having a paid up capital stock of $50,000. The City of Hartford, Wisconsin, one of the defendants in error, is a municipal corporation of the State of Wisconsin authorized to levy and collect taxes for city, county and state purposes. During 1921 the taxing officers of the City assessed and levied a personal property tax for said year on all of the shares of stock of the plaintiff Bank at the then prevailing tax rate in the assessment district in which the Bank was located, to-wit: at the rate of $3.177 on each $100 of the assessed valuation, which tax on the whole of said stock amounted to $2,859.30. Said taxes were entered on the tax roll, and the warrant for the collection thereof was placed in the hands of the City Treasurer (R. complaint 11; answer 14, 15; findings 17, 18).

Said taxes were assessed and levied under and pursuant to Sections 70.31, 70.37, 70.38, 70.39 and 70.40 of the Wisconsin Statutes for 1921, which provided specifically for the assessment and taxation of shares of stock in every bank or banking association, whether organized under the authority of any law of the State of Wisconsin or any act of the Congress of the United States, notwithstanding the fact that by Subdivision (10) of Section 70.11 of said statutes it was provided that all moneys or debts due or to become due to any person and all stocks and bonds other than shares of stock in

banks and banking associations should be wholly exempt from taxation.

The statutes of the state on this subject are set out in appendices C and E, *infra*.

Acting under and pursuant to the statutes aforesaid, the taxing officers made no assessment against and levied no taxes on any intangible property except shares of stock in banking corporations (Hahn, city assessor, R. 21 to 24; Radke, city clerk, R. 24; findings, R. 18).

On February 28, 1922, the Bank, on behalf of its stockholders as well as in its own behalf and interest, and in the manner provided for under the statutes of Wisconsin, paid said taxes under protest to the city treasurer (Complaint, R. 12; answer, R. 15; findings, R. 18, 19).

If it be assumed that the tax was illegal, the Bank, having made the payment under protest, is entitled under the laws of Wisconsin to maintain an action to recover back any sum paid by it on account of taxes so illegally assessed and levied (Opinion Supreme Court of Wisconsin, R. 71).

TRIAL COURT FINDING ON COMPETING MONEYED CAPITAL.

On the question as to the existence of competing moneyed capital, the trial court found as follows:

> "That during the year 1921 there was a very large amount of moneyed capital in the hands of individual citizens of said city of Hartford, running into many hundreds of thousands of dollars, that was neither assessed for taxation nor taxed, which entered into competition with the banking business, including the banking business of the plaintiff.
>
> "That during said year, 1921, there were vast amounts of moneyed capital in the hands of individual citizens of this state, running into millions of dollars that entered into competition with the banking business, that under the provisions of said section 70.11 subsection 10, were wholly exempted from taxation.

"That as a result thereof, the shares of stock of said plaintiff bank as well as the shares of stock of other national banking corporations doing business in this state, were taxed or attempted to be taxed at a much greater rate than other moneyed capital in the hands of individual citizens of said city and state, that entered into competition with the banking business, including the banking business of the plaintiff; and the taxation of said shares of stock in said banks, including the plaintiff bank, and the exemption of said amounts of moneyed capital in the hands of individual citizens entering into competition with the banking business, resulted in an unjust, illegal and discriminating tax against said bank's shares." (R. 18).

SUPREME COURT DECLARATION ON COMPETING MONEYED CAPITAL.

Referring to the foregoing finding, the Supreme Court of Wisconsin said:

"At this point we may say that in our consideration of the validity of this legislation, we do not consider ourselves concluded as in an ordinary case by the findings of fact made by the trial court, not only because the findings are general in their terms and present matters which are mixed questions of law and fact, but for the further reason that the law under consideration is one of state wide application. The court is required to take judicial notice of the general conditions to which the law applies. It is either valid in toto or void in toto. Its validity cannot be made dependent upon a particular finding of fact relating to the conditions in a single locality so that, assuming it to be administered as written, the law might be held valid in one place, void in another, or valid at one time and void at another. State vs. Layton, 160 Mo. 74; Pittsburgh C. C. St. L. R. Co. vs. Hartford City, 170 Ind. 674; St. Louis vs. Liessing, 190 Mo. 464; 1 L. R. A. (N. S.) 918; 20 L. R. A. (N.

S.) 461. In this respect this case differs materially from some of the cases heretofore decided by the Supreme Court of the United States." (R. 76).

The court then proceeded, upon consideration of matters of which it saw fit to take judicial notice, to draw the following conclusions:

"(c) All persons, firms and corporations doing a banking business are required to organize as banks and so become taxable as national banks are taxed. There is no business conducted within the state which is in direct competition with national banks not taxed as national banks are taxed. (R. 89, 90).

"(d) Moneyed capital in the hands of individual citizens, invested in mortgages and securities for their own personal benefit, does not in fact compete as a business with moneyed capital invested in shares of national banks for the business which national banks are authorized to do. If there is any competition as to loans, such competition is within such a narrow and restricted field and so inconsequential in amount as not to be in fact discriminatory within the decisions already cited." (R. 90).

As we proceed we shall point out that the law requiring persons, firms and corporations doing a banking business to organize as banks and so become taxable as national banks are taxed has reference only to the business of banks of deposit. There is nothing in the laws of Wisconsin to prevent an individual, firm or corporation from carrying on all the business commonly carried on by a bank of discount and in so doing from employing any amount of moneyed capital in that business.

DISSENTING JUSTICES' VIEWS.

While the Supreme Court overrode the findings of the trial court on conclusions drawn from matters declared to be

within the field of judicial notice, three of the seven members of the court dissented, their views being voiced by the Chief Justice in an opinion in the course of which he says:

> "The undisputed evidence in the case shows that there is such competition so far as the plaintiff bank is concerned. The taxing officer and the state introduced no evidence to rebut that which the bank offered, so that the testimony in the case is undisputed except in so far as it may be in conflict with facts of which the court may take judicial notice. (R. 91; 187 Wis. 290, 326) * * * It seems to me that the uncontradicted testimony of the president of the plaintiff bank that there are a number of loan companies in the city of Hartford that come in direct competition with the loaning business of the First National Bank is in accordance with facts generally known to exist in the banking and loaning business, and that it is quite probable, as he says, that the condition existing in his locality obtains throughout the state. (R. 92; 187 Wis. 290, 327, 328) * * * But as was said in *Mercantile Bank vs. New York,* 121 U. S. 138, 7 Sup. Ct. 826, a part of the legitimate business of a national bank is 'the discounting of commercial paper, making loans of money on collateral security, and negotiating loans, dealing in bonds, etc.' Now it is a well known fact that in our state there are numerous private individuals and partnerships and corporations that can and do engage in this class of business just mentioned which is a part of the business of a national bank, and the money invested in such enterprises runs into the millions of dollars and the business transacted by them runs into the hundreds of millions of dollars annually." (R. 94; 187 Wis. 290, 330).

We shall later point out:

1. That the undisputed evidence established the existence of substantial amounts of competing moneyed capital;

2. That the finding of the trial court was not only amply sustained but required;

3. That the declaration of four members of the Supreme Court cannot make anything a matter of common knowledge where three members not only disagree but declare that the contrary is established as a matter of common knowledge; and

4. That nothing can be a matter of common knowledge to the Supreme Court of the State of Wisconsin which, without the aid of any information from an opinion of that court, is not already a matter of common knowledge to the members of this court.

The evidence was not only sufficient to support the findings of the trial court but left no room for any other finding.

UNDISPUTED EVIDENCE AS TO OTHER MONEYED CAPITAL IN COMPETITION WITH NATIONAL BANKS.

The existence of large and substantial amounts of competing capital was established by the undisputed testimony of John G. Liver, the president of the bank (R. 24 to 46, 56); Hugh W. Grove, treasurer of the First Wisconsin Company of Milwaukee (R. 46 to 51); Edward C. Schauer, secretary and treasurer of the Hartford Building & Loan Association (R. 51 to 56); C. W. Sayles, a dealer in mortgages at Hartford (R. 57, 58); Edward Russell, engaged in the loan business at Hartford (R. 65, 66); and W. T. Leins, register of deeds of Washington County (R. 57).

Mr. Liver, for over 50 years a resident of Hartford, for 17 years president of the bank, for two years president of a territorial group of the Wisconsin Bankers' Association, comprising Dodge, Washington, Walworth and Rock counties, and who prior to engaging in the banking business had been engaged in various business enterprises, including that of general merchandising at Hartford, and who was familiar with business conditions in that community (R. 24, 25), testified in substance as follows:

Hartford, a city of about 4,500, has tributary thereto a prosperous farming community in which financial conditions are good (R. 25). A considerable number of farmers living around the city move there when they retire (R. 25, 26). The plaintiff bank does not confine its business to the city alone, but extends it to the surrounding territory (R. 25, 26).

The bank receives deposits, loans money to individuals and corporations, has a savings box department, deals in exchange and does the other business that may properly come before a bank. It buys and sells government bonds, notes, mortgages and securities, discounts commercial paper, loans on mortgages and buys mortgages, though the latter is not a large part of its business, and deals in bonds of organizations like the Wisconsin Farm Loan Association, which it buys for its own investments and to accommodate its clients, a good many of which are disposed of to such clients—to individuals (R. 26).

There were various individuals and concerns engaged in selling notes, mortgages and securities in the city in 1921 and prior thereto (R. 26, 27).

Asked to name a few of these he specified Mr. Ed. Russell, who had been in that line of work in Hartford about eight or ten years, and conducted his business quite extensively (R. 27); Charles Sayles, residing in the city, and engaged in the loan business (R. 27); Mr. Thoma (R. 27); and the Hartford Building & Loan Association (R. 27).

There are real estate firms in the city engaged in loaning out money to individuals in the community, notably among these being Sauerhering & Gehl, who make loans on real estate and have been in that business approximately 12 or 15 years (R. 27).

These concerns had loaned out to individuals a large amount—about $250,000 or $300,000 annually (R. 27).

These loaning concerns competed with the business of the

bank the same as any other bank would be in competition (R. 27).

The bank loans from whatever funds it has on deposit and where money is withdrawn that affects its loaning department. These withdrawals up to and including 1921 of which he had personal knowledge were substantial in amount. Compared to what is invested in the capital stock of the bank it would be a good deal larger amount (R. 28).

Other concerns located in Milwaukee and Chicago are engaged in buying and selling securities, mortgages, notes and bonds in that community in addition to the local concerns. They come right out to the city and solicit and they circularize when they issue bonds.

Asked to name some of these that came to his city he named First Wisconsin Company of Milwaukee, Morris F. Fox & Co., Edgar Ricker & Co., Grossman, Lewis & Company, Best & Gregg Co. They cover territory outside of the city.

The general nature of the securities they offer includes bonds, notes, mortgages and stocks; among the bonds, real estate bonds and utility bonds; in fact all kinds of bonds—bonds on buildings, bonds on farms, and municipal bonds (R. 28). The effect upon the banking business when non-local bonds are sold in the community is that people draw out their money and buy bonds (R. 28). They draw from savings accounts and some time certificates (R. 29). The effect of the sales of these bonds and securities upon the banking business is that it reduces deposits. Savings accounts are slowly built up (R. 29). These so-called bond houses sell their bonds and securities in the banking district tributary to Hartford in substantially large quantities—quite so (R. 29).

The Hartford Building & Loan Association, a concern engaged in loaning money, has been in business in Hartford

for 8 or 10 years. Asked how they competed with the banking business he answered: "Well that competes with the banking business the same as the banks do. They receive deposits and make loans." It has been their prevailing practice to pay interest at the rate of 5%. The prevailing rate that the banks pay is 3%. The effect upon the banking business is that when people can get 5% "they prefer to take it there instead of to us" (R. 29).

Merchants and manufacturers put the bulk of their account in checking accounts. A large amount of the certificate of deposit account is held by retired farmers—pretty much by individuals (R. 29, 30).

He knew from his experience as a banker and his financial connection with the Wisconsin Bankers' Association that the situation to which he testified at Hartford was the same in banks generally, the amounts in some localities being, of course, very large. The effect upon the banking business—upon the way in which moneyed capital competes with the banking business is about the same all over (R. 30).

A concern known as the Ziegler Company, with its home office at West Bend, engaged in the real estate and loan business, does a large amount of loan business in Hartford, where it has an agency or representative. They push their business by circularizing their loans and solicit in many ways, and have made large loans to individuals in the city running up in the thousands of dollars. Their loaning business is quite large (R. 30).

On cross-examination it was developed that on May 1, 1921, the bank owned in the neighborhood of $35,000 of municipal bonds and $60,000 of government bonds (R. 33), that the fact that Sauerhering & Gehl make loans causes losses to the bank (R. 39), that there are lots of concerns like the building and loan associations that take deposits and hold them as deposits (R. 39), that the bank frequently

bought bonds for its own investment, that it had bought Washington County bonds directly from the municipality, that in May, 1921, it owned about $30,000 or $35,000 of municipal bonds, that it bought some of these bonds from concerns that were in competition with it, that they had had withdrawals from the bank by virtue of these concerns being in competition with it for the last ten or twelve years (R. 40).

On re-direct examination he stated that the Washington County bonds purchased by the bank it had sold right at home, mostly to its clients. They come in to inquire for investments and the bank tells them what it has as a matter of service to the people. "We think we give them pretty good investments" (R. 44, 45). He also stated that if loans had not thus been made to individuals and funds withdrawn for that purpose, the loaning power of the bank would be strengthened (R. 45).

The bank had been interested in obtaining federal loans and had made one federal loan about six months before the trial (R. 45).

He also stated that he personally had approximately $10,000 out on interest-bearing securities, the interest averaging about 5½% and bringing in an income of $600. The maximum tax that he would have to pay on an investment of $10,000 would be about $17 or $18. If he invested the same in capital stock of the bank in 1921, his tax on the investment would have been approximately $300 (R. 45, 46).

During 1920 and 1921 the bank was in the business of selling Wisconsin farm mortgage loans gotten from the Wisconsin Securities Company in Milwaukee and sold during 1921 in the neighborhood of $30,000 or $40,000. Asked under what circumstances these bonds were bought and sold, he said: "In the first place they were bought for our own investment, but we sold some to our clients when they wanted an investment, a good investment." But that was not the prime purpose of purchasing them (R. 56).

Hugh W. Grove is treasurer of the First Wisconsin Company, which is engaged in underwriting, wholesaling and general distribution of bonds and investment securities. In general it is engaged in the so-called bond business. In 1921 the business of that company in the sale of bonds and other securities extended to many million dollars—less than $100,000,000 and more than $25,000,000 (R. 46). It sold its bonds in Wisconsin and the upper peninsula of Michigan and occasionally outside of the state. Probably in excess of 90% were sold in Wisconsin. They were sold to individuals and corporations—largely to individuals. The average return on the corporation securities sold by it in 1921 was probably 7%, the maximum being about 8% (R. 47).

There are many other firms and individuals engaged in the selling of bonds in Milwaukee. He said that he could give the names of a good many and mentioned Second Ward Securities Company, Morris F. Fox & Company, Henry C. Quarles & Co., Edgar Ricker & Company (R. 47).

There are a large number of individuals in Milwaukee engaged in selling bonds who sell their bonds quite largely—extensively throughout the state (R. 47).

The preferred stock of the First Wisconsin Company is held very largely by the stockholders of the First Wisconsin National Bank. All of the common stock, excepting directors' qualifying shares, are held for the present and future stockholders of that bank, there being a direct relation between the First Wisconsin Company and the First Wisconsin National Bank. He stated the reason for that affiliation as follows: The First Wisconsin as such transacts the investment business which would naturally come to such affiliated institutions and inquiries which come to the affiliated institutions are turned over to the First Wisconsin Company, it being in that business. In that respect it relieves the bank of that work (R. 48).

There is competition between bonding companies as such and national banks. The First Wisconsin Company conducts some of the business that would ordinarily be conducted by the First Wisconsin National Bank.

A bonding company would come into competition with a national bank in two ways, competition for capital and competition for money which would ordinarily be on deposit with the bank.

Asked what he meant by competition for capital, he said: "Well in order to establish a national bank it is necessary to sell its stock and somebody has to furnish the money to buy the stock. Bonding houses are also soliciting those people who have funds for investment in securities, and naturally if all of the people who have funds to invest invested it in securities other than bank stock, the bank would be hard pressed to obtain capital on which to operate, and in that sense they are in competition for capital." (R. 48).

The amount of money invested in bonds and other investments and securities in Wisconsin in 1921 would run into many million dollars. As to the number of millions he could not say, but at least it runs into the millions (R. 48, 49). A very substantial proportion of that is held by individuals.

The amount of capital stock, undivided profits and surplus of national banks in Wisconsin in 1921 in round numbers was between $50,000,000 and $55,000,000. The figures for state banks are slightly in excess of that, between $55,000,000 and $60,000,000. The amount of money invested in bonds and other investments exceeds that invested in national and state banks many times, and that was true in 1921 (R. 49).

There is competition for business between national banks and bonding companies and individuals engaged in selling bonds. Asked how that competition takes place, he said: "That competition might arise in several ways. It might arise directly in that national banks are authorized to buy

and sell securities, or competition would arise in the money which the two institutions would lend. I apprehend that one of the functions of national banks is to lend money. Investment houses dealing in all kinds of securities would come into competition with such loans, especially in short time loans." (R. 49).

Money that is awaiting investment is largely held by individuals and a large part of it is on deposit with national banks. When that is invested the money is withdrawn from the banks by the depositor to pay the vendor of the bond (R. 49).

The witness was acquainted with individuals in Milwaukee engaged in making personal loans and in selling bonds and securities. The aggregate of their loans, even those he was acquainted with—is a very substantial amount (R. 49). If he were to take the trouble to compile a list of those he was not acquainted with it would be a long list with a large number of names (R. 49, 50). There are many other individuals engaged in selling mortgages.

There are also so-called acceptance companies in Milwaukee in the business of lending money and discounting commercial paper, and they compete directly with national banks. Their business is one of the functions of national banks—the discounting of notes. Asked if acceptance companies and individuals have taken over a large part of the business of national banks, he said: "In my judgment acceptance companies do handle large sums." (R. 50).

There are individuals engaged in selling foreign exchange in Wisconsin. That business comes into direct competition with national banks. The American Express Company is engaged in selling foreign exchange. That is one of the functions of national banks, so that there would be direct competition (R. 50).

The bonds sold by the First Wisconsin Company are both local issues and issues from without the state—a substantial

amount from out the state. When these bonds are sold a large proportion of the money would go to the east (R. 50).

The stockholders of the various bond houses mentioned as located in Milwaukee are very largely citizens of Wisconsin. There might be a few outside of the state, but not very many. Some of the companies named are partnerships, in which case the partners reside in Milwaukee (R. 50, 51).

On cross-examination he stated that the First Wisconsin Company was in competition with the First National Bank in the sale of bonds, assuming for that answer that one of the functions of national banks is selling bonds. Also that the First Wisconsin National Bank, through its officers and directors, organized the company to take over two of the functions of the First Wisconsin National Bank (R. 51).

Edward C. Schauer is secretary and treasurer of the Hartford Building & Loan Association.

His association was engaged in the business of loaning money at Hartford since December 1, 1916, carried on its operations within twenty-five miles of Hartford, and was permitted to loan to any one in that territory who might become a member. Its loans were restricted to farmers and home owners. About 90% of the individuals from whom its revenue was received live within a radius of ten miles of Hartford. It followed the practice of receiving money and issuing stock certificates. Where the entire amount was loaned by the individual at one time, there was issued a paid-up stock certificate. The individual had the right to receive his money back on thirty days' notice in writing, when he would receive the amount agreed upon when the money was placed with the association, the present prevailing rate being 5% (R. 52, 53). The association had paid as high as 5½% and as low as 4%. A fully paid certificate holder was required to be paid the prevailing rate every six months, which for three years had been 5%. It was the practice to place all moneys so received in the depository voted by the associa-

tion. Except for a period from about March 1st to April 1st, 1923, when the government was paying the War Savings stamps of the 1923 issue and the association was flooded with funds, it had always taken money from those offering it. It may receive money from outside the twenty-five mile radius but can only make loans within that radius (R. 53).

The association also issues installment stock certificates to those not caring to acquire a paid-up stock certificate. The installment stock certificate holder can withdraw the entire amount paid in at any time but is penalized if he withdraws within one year. He will receive no dividends. If he withdraws after one year he will receive 70% of the dividends (R. 54).

The greatest portion of the earnings of the association consists of interest received from mortgage loans. As this is received the company reinvests in first mortgages. The interest received from these first mortgages or loans is the principal source of its earning power. The members receive their proper share of the net interest earnings when accumulations are pro-rated (R. 54).

At the close of business on December 31, 1921, the mortgage loans outstanding amounted to $136,664.86. There were also outstanding stock loans amounting to $1,740.00 (R. 54, 55). The paid up stock amounted to $77,502.71 and the outstanding certificates to $43,691.85 (R. 55).

As reasonable amounts of money are gotten together, it is placed in a check account in the First National Bank of Hartford, with which all of its business has been done. It aims to keep its money working (R. 55). The large amount of its loans requires that. It does have considerable amounts on deposit at the bank and during the spring of 1924 it had as high as $14,000 at one time. That was an exceptional condition of affairs, however (R. 56).

Mr. W. T. Leins, register of deeds of Washington County, testified in substance as follows:

I have made a compilation of the amount of mortgages recorded in Washington County, Wisconsin, in the year 1921, running to individuals. The amount of these mortgages is $1,507,810.54. "It is very seldom that we have any mortgages to record in which the mortgagees are non-residents." (R. 57).

Mr. C. W. Sayles testified as follows:

He had lived in Hartford twenty years and had been engaged in selling mortgages in Hartford and the vicinity during the preceding ten years. The outstanding mortgages sold by him to individuals residing in the vicinity of Hartford amounted to about $500,000 (R. 57). Practically all of the money for which these mortgages were purchased went to western states. He had practically that amount of mortgage loans outstanding in 1923. They were interest bearing securities, the approximate rate being 6%. He got these mortgages from banks and loan companies. Some from Peters & Co., Minnesota, and Central Mortgage Company, Minnesota, and Interstate Securities Company, Minnesota. On the average these loans usually ran five years (R. 58).

Mr. Edward Russell testified in substance as follows:

In the insurance and loan business in Hartford for at least ten years. The individuals for whom he had loaned during the past ten years resided in Hartford and surrounding country. He loaned out money from time to time to such individuals on interest bearing securities—on bonds and mortgages. The land on which the mortgages were given was in North Dakota. These mortgages ran from three to five years and the average rate of interest was 6% (R. 65).

The city introduced in evidence the reports of the condition of the bank under the following dates: April 28, 1921 (Defendant's Exhibit 1, R. 143 and 143A); June 30, 1921

(Defendant's Exhibit 2, R. 144 and 144A); February 21, 1921 (Defendant's Exhibit 3, R. 145, 145A); and September 6, 1921 (Defendant's Exhibit 4, R. 146 and 146A).

These reports are on Treasury Department forms, and these forms indicate among other things the securities which it is contemplated that national banking associations may hold and the activities in which they may engage.

Each of these reports contains among other things a detail of bonds, securities, etc., other than United States securities, held by the bank, in which schedules are blanks for the following securities: (a) state, county, or other municipal bonds, (b) railroad bonds, (c) other public service corporation bonds, (d) all other bonds, (e) claims, warrants, etc., (f) judgments, (g) collateral trust and other corporation notes *(report of February 21, 1921, Schedule (19), R. 145A);* also (h) stock of Federal Reserve Bank, and (i) stock of other corporations *(report of April 28, 1921, Schedule (13), R. 143A; report of June 30, 1921, Schedule (12), R. 144A; report of September 6, 1921, Schedule (14), R. 146A).*

The detail of "Loans and discounts, including re-discounts" in the report of February 21, 1921, under Schedule (8) (R. 145A), contains the following items:

"Secured by real estate mortgages or other liens on realty NOT in accordance with Section 24, Federal Reserve Act, as amended... .....

"Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended ..... 33,325.00"

That of April 28, 1921, contains in Schedule (5) (R. 143A) the following items:

"Secured by real estate mortgages or other liens on realty NOT in accordance with Section 24, Federal Reserve Act, as amended... 12,450.00

"Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended ..... 20,875.00"

Under Schedule (6), on page 2, appear two real estate mortgage loans taken in 1920. Under Schedule (7) appear six city and six farm real estate mortgage loans taken on various dates during the years 1916 to 1920 inclusive (R. 143A).

The report of June 30, 1921, contains on the first page the item "Loans and discounts, including re-discounts" (R. 144), the detail of which is given under Schedule (5) on page 2 (R. 144A), where appear the following items:

"Secured by real estate mortgages or other liens on realty NOT in accordance with Section 24, Federal Reserve Act, as amended... 12,450.00

"Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended ..... 20,125.00"

The report of September 6, 1921, contains in Schedule (5) (R. 146A) the following items:

"Secured by improved real estate under authority of Section 24, Federal Reserve Act, as amended:

1. On farm land..... 11,200.00
2. On other real estate..... 8,775.00

"Secured by real estate mortgages or other liens on realty NOT in accordance with Section 24, Federal Reserve Act, as amended:

1. For debts previously contracted (Section 5137, R. S. U. S.)—
   a. Farm lands 14,064.00
   b. Other real estate..... .....
2. All other real estate loans—
   a. Farm lands ....
   b. Other real estate..... ....."

ARGUMENT

I.

GENERAL CONTROLLING PRINCIPLES.

The states having no power to tax national bank stock except by congressional permission, and the only permission granted being subject to the restriction that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens" of the state (Sec. 5219 U. S. R. S.), *taxation of other moneyed capital is a condition precedent to the taxation of national bank stock.*

The state of Wisconsin claims to have complied with this condition—that is to have taxed all other moneyed capital and at the same rate—because (as it is claimed) it has forbidden the conduct of banking business except by incorporated banks and has taxed all bank stock, state and national, alike, and that, aside from stock in such banking corporations, it is a matter of common knowledge, evidence and findings of a trial court to the contrary notwithstanding, that there is no other moneyed capital within the meaning of the permissive statute within the state.

All moneyed capital other than shares of stock in banking corporations is in fact wholly freed from taxation on the ad valorem system and there is no claim that there is any approach whatever to an indirect equivalent through the operation of the income tax law. (R. 76, 77. First National Bank of Hartford vs. Hartford, 187 Wis. 290, at 305.)

The statute restricting the conduct of banking business to incorporated banks is limited in its application to the business of the "soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business." It does not reach either individuals operating private banks of discount or individuals or shareholders of corporations engaged "in operations and investments other than receiving deposits

normally common to the business of banking" *(number 1 of the summary of purposes of Sec. 5219 in First National Bank vs. Anderson, ... U. S. ....., 46 Sup. Ct. Rep. 135, 138);* nor moneyed capital "employed, substantially as in the loan and investment features of banking, in making investments, by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment" *(number 2 of summary aforesaid).*

To paraphrase from *Merchants' National Bank vs. Richmond,* 256 U. S. 635 and *First National Bank vs. Anderson,* ..... U. S. ....., 46 Sup. Ct. Rep. 138, *the state "took the position that the congressional restriction was directed only against discrimination in favor of state banking associations."*

Where, as here, the state enacts a law under which *bank stock is taxed while it is directed that no other moneyed capital shall be taxed, that law is void on its face;* and *no proof of the existence or character of such other moneyed capital is required. That the law must operate in contravention of the permissive statute is apparent on its face and needs no proof.*

But if proof be required *the evidence upon which the trial court found the existence of competing moneyed capital was undisputed* and amply sustained the finding, *and requires the same finding in this court.*

II.

A STATE LAW IMPOSING ANY TAX ON SHARES OF STOCK IN NATIONAL BANKING ASSOCIATIONS NOT PERMITTED BY SEC. 5219 U. S. R. S. VIOLATES THE CONSTITUTION OF THE UNITED STATES.

Early in the history of national bank legislation it was held that national banks were federal agencies not subject to state sovereignty or to state control, but exclusively within the control of the federal government, and that any attempt

on the part of the state to tax them without the consent of Congress was beyond the state's power and void. This was necessary to the preservation of the federal government, since the power to tax involves the power to destroy. Fundamentally such a law is held invalid not by reason of a congressional prohibition but because it violates the Constitution of the United States.

McCulloch vs. Maryland, 4 U. S. (4 Wheaton) 316.
First National Bank vs. California, 262 U. S. 366.
Des Moines National Bank vs. Fairweather, 263 U. S. 103.
First National Bank of Guthrie Center vs. Anderson, ... U. S. ..., 46 Sup. Ct. Rep. 135, 138.

The basic principle is thus stated in the case last cited: "National banks are not merely private moneyed institutions, but agencies of the United States, created under its laws to promote its fiscal policies; and hence the banks, their property, and their shares cannot be taxed under state authority except as Congress consents, and then only in conformity with the restrictions attached to its consent."

First National Bank vs. Anderson, ... U. S. ..., 46 Sup. Ct. Rep. 138.

We submit that any law which must of necessity work in contravention of a constitutional limitation on legislative power whenever called into operation is in excess of that power from the moment of its enactment and void. Given a law under which no tax can be levied on other moneyed capital, that law must be held invalid as applied to national bank stock without regard to the present existence of other moneyed capital.

III

ALL MONEYED CAPITAL EXCEPT THAT INVESTED IN SHARES OF STOCK IN BANKS BEING EXPRESSLY EXEMPTED FROM TAXATION, DISREGARD OF THE CONGRESSIONAL RESTRICTION IS APPARENT ON THE FACE OF THE LAW AND ANY TAX ON SHARES OF STOCK IN NATIONAL BANKS THEREUNDER IS VOID.

In 1911 the State of Wisconsin abandoned the age old system of ad valorem taxation so far as personal property is concerned and went over to the system of income taxation. This was accomplished by the exemption of intangible personal property and the offset of the tax on tangible personal property against income taxes (R. 74). Up to that time it had been the purpose of the state, manifested by its taxing statutes, to tax all moneyed capital in general on the ad valorem basis. After that time it became the purpose of the state to exempt all moneyed capital in general and to impose an ad valorem tax only in special cases. It was assuming that the only comparison required was a comparison between national banks and state banks. In this the state legislature was in error.

Instead of a general purpose to tax all moneyed capital on the ad valorem basis, we now find a *general purpose to exempt* all moneyed capital from taxation on that basis. Exemption was no longer the exceptional thing. Taxation became the exceptional thing. Decisions dealing with partial exemptions or with limited rights of offset of debts against credits, necessarily exceptional in their character, must sometimes require the consideration of evidence in order to determine whether the proportion thereof which is left free from taxation is so great that it can be said to result in substantially lower taxation for moneyed capital as a whole than that levied on shares of stock in national banks. But it is quite a different thing to say that when

the court finds a statute which on its face manifests a general purpose to relieve other moneyed capital from taxation it will embark into an examination of evidence for the purpose of ascertaining in dollars and cents a result which in a substantial sense is obvious.

There have been on the part of the bar and on the part of some courts some misconceptions which would have been avoided if in reading the decisions of this court certain fundamental principles had been kept in mind. But for these misconceptions there would have been no difficulty in marking out adherence to a consistent line of reasoning leading logically to the decision in *Merchants' National Bank vs. Richmond,* 256 U. S. 635, and the subsequent cases.

Moneyed capital in the hands of individual citizens includes (1) shares of stock in incorporated banks, (2) capital employed in private banking, (3) shares of stock in corporations and other interests owned by individuals in all enterprises in which the capital employed is money and the object of the business is the making of profit by its use as money through investment in securities by way of loan, discount or otherwise, and (4) private investments not employed in private banking, strictly so-called, and yet coming into competition with national banks. The latter includes moneyed capital in the hands of private citizens employed substantially as in the loan and investment features of banking, in making investments by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment.

Congress had in mind when the law was first enacted that the states commonly employed ad valorem taxation in respect to all classes of property, both real and personal, both tangible and intangible; that it was common practice on well-recognized grounds of public policy to provide for reasonable exemptions from all taxation; that the states could not tax government securities without the consent of the na-

tional government, a consent which it was not the custom to grant; that it was common practice in most of the states to exempt public securities, such as state and municipal bonds; that the state, in creating certain classes of corporations, had, in some instances, bound themselves by contract to exempt such corporations either from all taxation or to restrict themselves in respect to the method of levying and the amount of such taxes; and that it was not considered that the states should be bound to adhere to any particular system of taxation so long as they did not run counter to any limitations imposed by the federal constitution intended to safeguard the rights and immunities of citizens of the United States or to insure equality of treatment between them.

It is clear that the act of Congress may be violated:

1. By a *law* taxing bank stock while all other moneyed capital is left untaxed or taxed at a lower rate;

2. By a *law* taxing bank stock and other moneyed capital, but exempting so much of the latter that the net result is to tax the aggregate of other moneyed capital at a lower rate;

3. By a *law* taxing national bank stock by one method and other moneyed capital by another method resulting in a lower rate; or

4. By a *maladministration of a law* providing for taxation of both, which results *in practice* in taxing the aggregate of other moneyed capital at a lower rate.

The *first* presents no issue of fact.

The *second* presents no issue of fact where the substantial character of the exemption is so great as to indicate a violation of the federal statute by the State Legislature itself. Where that is not apparent on the face of the statute, an issue of fact is raised as to whether bank stock is taxed at a higher rate than the aggregate of other moneyed capital.

The *third* usually presents an issue of fact as to whether discrimination actually results in the operation of the law.

The *fourth* always presents an issue of fact.

The case at bar presents, we submit, an instance of a violation of Section 5219 by a *law* taxing bank stock, while all other moneyed capital is left untaxed. This Court have never said that when this appears on the face of the law anything in the way of proof is required. Given a law so framed, the examination of evidence in respect to its operation is like to the attempt to add to one's stature "by taking thought". It is not a case where the general legislative purpose is to tax and the inquiry is as to the practical result of a specific or partial exemption. In that case, proof may be required. It is not a case in which there is a maladministration of a law valid on its face, in which case, of course, proof would be required. It is not a case of a law providing for a totally different method of taxation and which, it is claimed in actual operation, results in discrimination. In such cases, proof may be necessary. It is a case in which the purpose to omit from taxation is a legislative purpose; and it would be idle to weigh evidence for the purpose of determining what is already apparent.

Cases in which all moneyed capital except shares of bank stock is exempt or clearly taxed at a lower rate have consistently been disposed of without proof either as to the amount of moneyed capital involved in the exemption or discrimination or as to its competitive character.

People vs. Weaver (1879), 100 U. S. 539;
Supervisors vs. Stanley (1881), 105 U. S. 305;
Hills vs. Exchange Bank (1881), 105 U. S. 319;
Evansville Bank vs. Britton (1881), 105 U. S. 322;
Whitbeck vs. Mercantile National Bank (1887), 127 U. S. 193;
First National Bank vs. Chapman (1898), 173 U. S. 205.

Covington vs. First National Bank (1904), 198 U. S. 100;
Citizens National Bank vs. Kentucky (1909), 217 U. S. 443.

We beg leave to discuss the foregoing cases and certain related cases which can only be reconciled upon a recognition of the foregoing principles.

The case of *Lionberger vs. Rouse* (1869), 9 Wall. 468, arose under the Act of 1864 and the discrimination complained of was the failure to tax at the same rate as national bank stock the shares of *two* banks of issue created by the state prior to the passage of the National Banking Law by an act in which the state had limited its power to tax. The decision went on the ground that the second proviso in the Act of 1864 meant no more than to require that each state should [9 Wall. 476], "as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation." It simply illustrates *a purpose to recognize the general power of the states over their own taxing methods and to disregard inconsiderable exemptions.*

In *People vs. Weaver* (1879), 100 U. S. 539, the court held that the restriction of Section 5219 went not merely to the rate but to the entire process of assessment, including valuation. The court held that if a state permits an individual to deduct his debts from the valuation of his personal estate generally, it must likewise permit him to deduct them from the valuation of his national bank stock. The particular objection pointed out by the court was to allowing one who has [100 U. S. 543] *"money capital invested otherwise than in banks,* to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stocks can make no such deduction." There was no requirement of proof of the character or amount of the "money capital invested otherwise." We submit that this was because *the discrimination was general and not exceptional.*

In *Supervisors vs. Stanley* (1881), 105 U. S. 305, the statute for the taxation of bank stock standing alone contained nothing in conflict with the Act of Congress. The discrimination resulted from another statute, which permitted the deduction of debts from the entire value of personal property, but not from bank stock. The court held that as to any given shareholder who had no debts to deduct the law provided a mode of assessment which so far as he was concerned was not in conflict with the Act of Congress, but that a different situation existed in respect to the shareholder who had debts to deduct. As to him, however, it was worked out by treating the law providing for the taxation of his bank stock as valid while that denying him the deduction was held invalid. The court then said:

> [105 U. S. 315] "If he has debts to be deducted, the case of *People vs. Weaver* (100 U. S. 539) shows that in taking the steps which this court has held he may take, he can secure that deduction, and when secured the rest of the law remains valid. *In other words, in such a case, so much of the law as conflicts with the act of Congress in the given case is held invalid, and that part of the State law which is in accord with the act of Congress is held to be the measure of his liability.* There is no difficulty here in drawing the line between those cases to which the statute does not apply and to those to which it does, between the cases in which it violates the act of Congress and those in which it does not. There is, therefore, no necessity of holding the statute void as to all taxation of national bank shares, when the cases in which it is invalid can be readily ascertained on presentation of the facts." (Italics ours.)

The court did not inquire into the question as to the amount of other moneyed capital within the state. It assumed its existence and treated the portion of the statute denying the deduction as invalid on its face. *The defect there*

could be cured by securing to the taxpayer the deduction. It can be cured here only by taxing other moneyed capital. If there was no necessity for the proof of the existence of other moneyed capital in that case, there is no necessity for it in the case at bar. The case just cited was decided on the theory that the law denying the right of offset was void on its face. *By the same reasoning, if the law entirely exempted other moneyed capital, it would be held void on its face.*

In *Hills vs. Exchange Bank,* 105 U. S. 319, a companion case to *Supervisors vs. Stanley,* 105 U. S. 305, it was held that where a stockholder in a national bank shows that his personal property subject to taxation, including his bank shares, after deducting therefrom his just debts is of no value, he is clearly entitled to relief against an assessment made on account of his bank stock on the theory that he was not entitled to have considered in connection therewith a deduction on account of debts, although it was allowed in respect to other personal property. *There was no proof and no suggestion of the necessity for proof of the existence of such other moneyed capital.*

In *Evansville Bank vs. Britton,* 105 U. S. 322, relief was granted to shareholders claiming the right to have debts deducted in the valuation of their shares of stock, although the statute provided for such deduction only in respect to credits. The court say:

> [105 U. S. 324] "It is unnecessary to repeat the argument in *People vs. Weaver* (100 U. S. 539) on this point. We are of opinion that the taxation of bank shares by the Indiana statute, without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress."

If in the case at bar it were necessary to offer proof of the existence of competing moneyed capital, then it would have

been necessary in the *Evansville Bank case* to prove the existence of credits or money at interest and other demands against persons and bodies corporate constituting competing moneyed capital before any relief would be granted giving to national bank shareholders the same right of offset given in respect to such other moneyed capital. *The effect of the decision is to hold that so far as the limitation on the right of offset is concerned, the statute was void on its face. There was no necessity for proof.*

In *Whitbeck vs. Mercantile Bank* (1887), 127 U. S. 193, it was held that there was a discrimination forbidden by Section 5219 in the valuation and taxation of bank stock at a higher rate than that laid upon other moneyed capital and also in that while the statutes permitted a taxpayer owning moneyed capital subject to taxation to make a deduction from the amount assessed against him on account of credits of the amount of his bona fide indebtedness, no such provision was made in regard to the indebtedness of any holder of bank stock. There was no evidence as to the amount of such other moneyed capital or as to its character or use. In so far as the particular objections are concerned the effect of the decision is to hold that a statute imposing a higher rate on bank stock than on other moneyed capital or denying a deduction for indebtedness in the assessment of bank stock while granting it in respect to other moneyed capital, is void on its face because in violation of the permissive statute.

That this is the effect of the decision in *Whitbeck vs. Mercantile National Bank of Cleveland* was expressly recognized in *National Bank of Wellington vs. Chapman*, 173 U. S. 205, at 219.

In *National Bank of Wellington vs. Chapman* (1898), 173 U. S. 205, the principal objection made had reference to permitting an offset of indebtedness against credits when no corresponding offset was allowed against shares of stock in national banks. However, as appears from the copies thereof

set up in the margin (173 U. S. 205, at pp. 209 to 213), the statutes involved contained a limited statutory definition of credits not reaching all the moneyed capital in the state, and therefore of necessity including credits which would not answer to the description of moneyed capital. It was a case of an attack on the tax, not on the ground of a general discrimination in favor of all other moneyed capital, but of a particular and limited discrimination in favor of a part only of a particular kind of moneyed capital. It is an instance of a law taxing bank stock and other moneyed capital but exempting a part of other moneyed capital and presenting an issue of fact as to whether so much of other moneyed capital was exempted that the result was to tax the aggregate of other moneyed capital at a lower rate. Grant that this presents an issue of fact, and grant that the issue requires proof. It has no bearing in a case where, as here, we have, not a law which, while taxing other moneyed capital generally, exempts a particular kind of other moneyed capital, but a law which in general leaves other moneyed capital wholly untaxed—so far as ad valorem taxation is concerned.

The case of *Amoskeag Savings Bank vs. Purdy* (1913), 231 U. S. 373, arose on certiorari. The objection to the tax was that the shareholder was not allowed to offset debts against the valuation of bank stock holdings, although there was such right of offset in respect to other moneyed capital. The distinguishing feature between that case and *People vs. Weaver*, 100 U. S. 539, is that, while in the *Weaver case* the tax assessed on bank stock was on the basis of the same method of valuation and the same rate of assessment as personal property in general, including other moneyed capital, but without allowance for the indebtedness of the taxpayer, although such allowance was made to the owners of personal property in general, including other moneyed capital, the law in the latter case was materially different. In the *Amoskeag case* other moneyed capital was dealt with for the purposes of taxation by one method and bank stock by another.

Where, as in the *Weaver case,* the two classes of property were dealt with so far as valuation and rate are concerned by the same method, *the deduction of indebtedness from other moneyed capital while it was denied in respect to bank stock necessarily resulted in a forbidden discrimination.* Where, however, as in the *Amoskeag case,* two entirely different methods were employed, refusing to permit the deduction would not necessarily result in a discrimination forbidden by the statute, *since even without the deduction bank stock might still be assessed and taxed as low as or at a lower rate than other moneyed capital.* In the former case no proof would be required. In the latter case proof would be required. Thus it follows that the *Amoskeag case* presents an instance of a claim that the Act of Congress is violated by a law taxing national bank stock by one method and other moneyed capital by another method, which might properly be held to present an issue of fact as to whether discrimination actually results in the operation of the law.

In *Covington vs. First National Bank* (1904), 198 U. S. 100, there is no reference to the amount of moneyed capital involved or as to its competitive character.

The same is true of *Citizens National Bank vs. Kentucky* (1909), 217 U. S. 443.

In *Eddy vs. First National Bank of Fargo* (Circuit Court of Appeals, Eighth Circuit, 1921), ... C. C. A. ...., 275 Fed. 550, the court recognized the difference between the discrimination resulting from a partial exemption of and a total failure to tax other moneyed capital and, while the decision was not based on that ground, it quite clearly indicated that it would take judicial notice of the existence of a substantial amount of moneyed capital held by citizens of North Dakota not invested in shares of state and national banking associations.

Cases dealing with partial exemption have no weight in opposition to the foregoing. These cases may be divided into three groups comprised of (a) exemptions to further a

policy, (b) exemptions of moneyed capital deemed unsubstantial in amount, and (c) exemptions of personal property held not to be moneyed capital.

(a) Congress did not intend to deprive the state of the right to exempt particular kinds of property from taxation to further a policy and therefore such exemptions reasonable in amount are not in violation of Section 5219.

In *Davenport Bank vs. Davenport Board of Equalization,* 123 U. S. 83, it was pointed out that savings banks were exempted from taxation. The court held that this exemption was to encourage saving and did not show a violation of Sec. 5219. The reason for the exception to the general rule is well stated in *Adams vs. Nashville,* 95 U. S. 19, a case in which certain municipal bonds of the city of Nashville were exempted from taxation. Said the court:

> "It [the act of Congress] was not intended to cut off the power to exempt particular kinds of property, if the legislature chose to do so. Homesteads, to a specified value, a certain amount of household furniture (the six plates, six knives and forks, six teacups and saucers, of the old statutes), the property of clergymen to some extent, schoolhouses, academies and libraries are generally exempt from taxation. The discretionary power of the legislatures of the states over all these subjects remains as it was before the act of Congress of June, 1864."

Other cases dealing with the rule as to reasonable exemptions to further a policy are:

Mercantile Bank vs. New York, 121 U. S. 138. (Savings banks exempted.)

Bank of Redemption vs. Boston, 125 U. S. 60. (Savings banks exempted.)

(b) Exemptions deemed so unsubstantial in amount as not reasonably to warrant a conclusion that the other moneyed capital of the federal statute is exempt, do not void the tax as to national bank stock.

In *Mercantile Bank vs. New York,* 121 U. S. 138, the court expressed the reason for the rule when it said:

> [121 U. S. 138, at 151] "It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt."

Exemption of an immaterial amount of moneyed capital from taxation, moneyed capital in general being taxed, does not show a violation of Section 5219.

In *Hepburn vs. School Directors,* 23 Wall. 480, the question was whether an owner of national bank shares residing in Cumberland county, Pennsylvania, was exempt from a local tax by reason of a statutory exemption from all taxation in that county, except for state purposes, of mortgages, judgments, recognizances, and money owing upon articles of agreement for the sale of real estate, except mortgages, judgments and articles of agreement given by corporations. The value of such securities held by individual citizens did not appear. Said the court:

> [23 Wall. 480, at 485] "This is a *partial exemption only.* It was evidently intended to prevent a double burden by the taxation, both of property and debts secured upon it. *Necessarily, there may be other moneyed capital in the locality than such as is exempt.* If there is, moneyed capital, as such, is not exempt. Some part of it only is. *It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt.* Certainly there is no presumption in favor of such an intention. To have effect it must be manifest. The affirmative of the proposition rests upon him who asserts it. In this case it has not been made to appear." (Italics ours).

In *Boyer vs. Boyer,* 113 U. S. 689, the court said with reference to the last mentioned case:

> [113 U. S. 689, at 693] "That case is authority for the proposition that a *partial* exemption by a state, for local

purposes, of moneyed capital in the hands of individual citizens does not, of itself and without reference to the aggregate amount of moneyed capital not so exempted, establish the right to a similar exemption in favor of national bank shares held by persons within the same jurisdiction. *But it is by no means an authority for the broad proposition that national bank shares may be subjected to local taxation where a very material part, relatively of other moneyed capital in the hands of individual citizens, within the same jurisdiction or taxing district, is exempted from such taxation.*" (Italics ours).

These cases involve no departure from the general rule. Exemptions immaterial in amount do not, where all other moneyed capital is taxed, show an intent to violate Section 5219.

Where, while the exemption is partial, the amount of moneyed capital exempted is comparatively large, the court may be faced with a further question whether in proportion to the whole mass of moneyed capital that exempted is so substantial in amount as reasonably to furnish the basis for a conclusion that the other moneyed capital of the federal statute as a whole is not taxed at the same rate as shares of stock in national banks. It is always recognized that "cases will arise in which it will be difficult to determine whether the exemption of a particular part of moneyed capital in individual hands is so serious or material as to infringe the rule of substantial equality."

Boyer vs. Boyer, 113 U. S. 689, at 702.

As stated in *People ex rel. Hanover National Bank vs. Goldfogle, et al.,* 234 N. Y. 345:

> [234 N. Y. 345] "In doubtful cases the burden may rest on the bank to establish inequality. *National Bank of Commerce vs. Seattle,* 166 U. S. 463; *First National Bank of Wellington vs. Chapman,* 173 U. S. 205."

Discussions dealing with the necessity for proof in the case of partial exemption will be found in the following cases:

National Bank of Wellington vs. Chapman, 173 U. S. 205;
Bank of Garnett vs. Ayers, 160 U. S. 660;
Aberdeen Bank vs. Chehalis County, 166 U. S. 440;
Commercial Bank vs. Chambers, 182 U. S. 556.

In *Boyer vs. Boyer* (1884), 113 U. S. 689, it is recognized that even where the exemption is partial only, the discrimination may be so apparent and substantial on the face of the statute as to enable the court to say that other moneyed capital is not taxed at the same rate as shares of stock in national banks, and that therefore the provision for the tax on such shares of stock is void.

(c) Exemptions of personal property held not to be moneyed capital call for no extended discussion at this point. The moment any class of property is determined not to be moneyed capital, it becomes unnecessary to consider it on the question as to whether the law is invalid on its face.

IV.

UNDISPUTED EVIDENCE SHOWS EXISTENCE IN WISCONSIN OF A LARGE AND SUBSTANTIAL AMOUNT OF OTHER MONEYED CAPITAL COMING INTO COMPETITION WITH NATIONAL BANKS, WHICH MONEYED CAPITAL IS WHOLLY EXEMPTED FROM TAXATION.

The trial court found the existence of large and substantial amounts of competing moneyed capital in the hands of individual citizens that were wholly exempted from taxation (R. 18).

The Supreme Court stated that they did not consider themselves "concluded as in an ordinary case by the findings of

fact made by the trial court, not only because the findings are general in their terms and present matters which are mixed questions of law and fact, but for the further reason that the law under consideration is one of state-wide application. The court is required to take judicial notice of the general conditions to which the law applies" (R. 76). The Supreme Court also held that the law was "either valid in toto or void in toto. Its validity cannot be made dependent upon a particular finding of fact relating to the conditions in a single locality so that, assuming it to be administered as written, the law might be held valid in one place, void in another, or valid at one time and void at another." (R. 76).

The court also announced the view that the income tax was not an equivalent or substitute for the ad valorem tax levied on stock of national banking associations (R. 76).

Taking up the question as to whether shares of stock in national banking associations were assessed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens, the court said:

> "If Section 5219 as amended were presented without interpretation by the Supreme Court of the United States we should have no difficulty in affirming the judgment of the trial court, for the reason that there are many businesses in which 'moneyed capital in the hands of individual citizens' is exempt from ad valorem taxation and the income derived therefrom is taxed, which income tax is in lieu of other taxes." (R. 73).

Discussing the change to the income tax system in 1911, the court quoted from the opinion rendered in the first suit testing the validity of that law to the effect that thereby personal property taxation for all practical purposes became a thing of the past. "The specific exemptions of all money and credits and the great bulk of stocks and bonds, as well as of all farm machinery, tools, wearing apparel, and household furniture in actual use, regardless of value, goes far

to eliminate taxation of personal property; while the provision that he who pays personal property taxes may have the amount so paid credited on his income tax for the year seems to put an end to any effective taxation of personal property." (R. 74, quoting from *Income Tax Cases,* 148 Wis. 456, at 503).

Continuing, the court stated that the legislature undertook to classify moneyed capital so as to bring all moneyed capital in competition with moneyed capital invested in shares of national banks into one class and did this by providing that all banking companies be taxed on the ad valorem basis, the legislature having theretofore defined banking and restricted the conduct of banking business to incorporated banks. At this point the court quoted Section 2024-78*l*, Wis. Stats. 1921, and cited Section 2024-78*m* and the case of *MacLaren vs. State,* 141 Wis. 577, to the proposition that "since the enactment of that law, the banking business of the state has been strictly confined to national banks and corporations organized under the banking laws of the state." (R. 75). An examination of the statutes and the case just cited will demonstrate that the statutes in question are aimed at *banks of deposit* and not at banks of discount. There is nothing to prevent an individual, partnership or non-banking corporation from carrying on all the business commonly carried on by a bank of discount and employing any amount of moneyed capital in that business.

The court then took up the decisions of this court with a view to indicating its understanding as to the extent to which the meaning of the phrase "other moneyed capital in the hands of individual citizens" had been here limited (R. 77) and quoted at some length from a number of decisions commencing with *Mercantile Bank vs. New York,* 121 U. S. 138, and ending with *Merchants' National Bank vs. Richmond,* 256 U. S. 635. In discussing the last mentioned case the court say:

> "There is nothing *in the published report* to indicate whether the bonds, notes and other evidences of indebtedness aggregating $6,250,000, are held *by private banks or other persons.* We find nothing in the laws of the state of Virginia which restricts the business of banking to corporations organized under the laws of that state or of the United States and it is asserted in the briefs of counsel that there are in fact a number of private banking institutions within the city of Richmond. *Nor is there anything in the published report to indicate definitely what is meant by competition. If the rule laid down in the Aberdeen Bank case is adhered to,* it must mean something more than the mere fact that citizens of the state are loaning to each other, for there the allegation of the bill was that $14,000,000 was invested in loans and securities by the citizens of the state of Washington and to them payable and owing by other citizens of said state." (R. 84). (Italics ours).

The inference from this would be that the majority of the court assumed that this court had before it in the record in the *Richmond case* some proof that these bonds, notes and other evidences of indebtedness were in the hands of private bankers.

The court then took up the definition of the word "competition", saying: "As the word is used in the decisions referred to it undoubtedly means that if there is any material amount of moneyed capital engaged in *a business which bids against national banks for the business which they are authorized to do, competition exists."* (R. 85). (Italics ours.)

The conclusion is then drawn that there are no concerns or individuals in the state engaged in enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money, except banks (R. 86); that building and loan associations cannot be regarded as in competition with

national banks (R. 86); that brokers and dealers in bonds, mortgages and securities are not in competition because national banks are not authorized to carry on the same business (R. 86); that acceptance companies are not to be considered because there is a wide gap between the securities in which they may deal and the ordinary commercial paper accepted by banks in the usual course of their business (R. 87); and that although it "appears from the evidence and is a fact known to everyone that in the state of Wisconsin there are many individuals who loan their own money upon real estate mortgages, bonds and other interest bearing securities in lieu of depositing the same in banks or investing in stocks or other forms of investment," they cannot be regarded as in competition with national banks (R. 88).

This opinion was concurred in by four members of the court. Three members of the court joined in a very vigorous dissent by the chief justice, in the course of which he says that the undisputed evidence shows that there is such competition (R. 91); that this evidence is in accordance with facts generally known to exist in the banking and loaning business, a condition obtaining throughout the state (R. 92); that "it may be safely said that in larger cities the amount of money loaned by loaning companies in all probability exceeds the amount per capita in the smaller cities" (R. 92); and that it is a well known fact that in Wisconsin there are numerous private individuals, partnerships and corporations that can and do engage in the business of discounting commercial paper, making loans of money on collateral security, and negotiating loans, dealing in bonds, etc., which is stated in *Mercantile Bank vs. New York*, 121 U. S. 139, to be a part of the legitimate business of a national bank (R. 94).

A.

THE EVIDENCE ON COMPETING CAPITAL IS UNDISPUTED.

The city called four witnesses:—Mr. William Radke, the city clerk (R. 59), Mr. E. W. Sawyer, one of the plaintiff's

attorneys, who happened to be a director of the Hartford High school (R. 61), Mr. Charles Friday, an officer of the Hartford High school (R. 62), and Mr. John G. Liver, the president of the bank (R. 64). All of this testimony related to the levy of taxes and to sales of stock of the First National Bank of Hartford as bearing, we assume, on valuation, but made no attempt to controvert the evidence going to show the existence of competing capital. So far as this issue is concerned, the case is therefore before the court on undisputed evidence.

B.

THE STATE SUPREME COURT'S DECISION BEING BASED NOT ON EVIDENCE BUT ON JUDICIAL NOTICE AND THEIR VIEWS OF THE LAW, THIS COURT MUST PASS ON THE QUESTION OF FACT FOR THEMSELVES, DECIDING FOR THEMSELVES WHAT ARE MATTERS OF COMMON KNOWLEDGE AND WHAT IS THE LAW APPLICABLE TO THE SITUATION.

The trial court made a clear and definite finding of a very large amount of moneyed capital both in the city and in the state entering into competition with the banking business, including that of the plaintiff, which under the statute is wholly exempt. The Supreme Court brushed aside the finding of the trial court as being based on a misunderstanding of the law and directly contrary to matters of common knowledge. The Supreme Court point to nothing either in the trial judge's memorandum decision (R. 16) or in the findings of fact or in the conclusions of law (R. 17 to 19) which indicates a misconception or misunderstanding of the law. If this court upon examination of the opinions shall find that the majority of the Supreme Court of Wisconsin misunderstood and misapplied the decisions of this court, or shall find that the evidence is not in conflict with matters which are of common knowledge to the members of this court, then there can be no room for any argument to the effect that

conclusions of the State Supreme Court on that subject are in any measure controlling.

Merchants' National Bank vs. Richmond, 256 U. S. 635, at 638.

Carlson vs. Curtiss, 234 U. S. 103, at 106.

In considering the effect to be given to the decision of the Supreme Court of Wisconsin on the question of fact, it is to be borne in mind that under the law of Wisconsin the State Supreme Court is bound by the findings of the lower court wherever the findings are supported by credible evidence. They cannot be disturbed unless they are contrary to the clear preponderance of the evidence.

McMynn vs. Peterson, 186 Wis. 442, 469.

Hayton vs. Appleton Machine Co., 179 Wis. 597, at 601.

The opinion of the Supreme Court of the State of Wisconsin should be read and interpreted with this rule of procedure in mind. If the Supreme Court of Wisconsin had correctly interpreted the decisions of this court dealing with Section 5219, the finding of the trial court would not have been disturbed. That it did misunderstand the decisions of this court, we shall presently point out.

The State Supreme Court's view of the law colors its conclusion on this question, and if that view of the law be erroneous in any particular, no presumption may be indulged as to what the conclusion would have been but for such error.

Here the federal right is basic and dominates the case. In determining whether a federal right has been wrongly denied this court may go behind the finding to see whether it is without substantial support. "If the rule were otherwise, it almost always would be within the power of a state practically to prevent a review here".

Truax vs. Corrigan, 257 U. S. 312, at 324.

This court will review the findings of fact by a state court (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so mingled as to make it necessary in order to pass upon the federal question to analyze the facts.

Northern Pacific Railroad Co. vs. North Dakota, 236 U. S. 585, 593.

Truax vs. Corrigan, 257 U. S. 312, 325.

Kansas City Southern Railway vs. Albers Commission Co., 223 U. S. 573, 591.

Cedar Rapids Gas Co. vs. Cedar Rapids, 223 U. S. 655, 668.

Mackay vs. Dillon, 4 Howard 421, 447.

Aetna Life Ins. Co. vs. Dunken, 266 U. S. 389, 394.

Again, the State Supreme Court's decision is based upon the proposition that the evidence is contrary to matters of common knowledge. Of course, those things which are matters of common knowledge are not required to be proven. That is on the theory that they are known to all persons. Whether the existence or non-existence of competing capital in Wisconsin is a matter of common knowledge or not is clearly demonstrated by the manner in which the members of the Supreme Court of the state divided on the question. While four members of the court stated that it was a matter of common knowledge that there was no competing moneyed capital in the state, three members of the court not only took the view that the evidence was sufficient to support a finding on the existence of moneyed capital but took the further view that it was a matter of common knowledge that there was such moneyed capital within the state. It could hardly be claimed that anything was a matter of common knowledge when three out of every seven persons would declare the fact to be the other way. If the seven members of the Supreme Court of the State of Wisconsin divide on

the question in this manner, it may fairly be assumed that the opinion of the minority represents the views of three out of every seven persons of a high order of intelligence in the state.

Brown vs. Piper, 91 U. S. 37, 42.

Again, we submit that nothing can be a matter of common knowledge to the members of the Supreme Court of Wisconsin which is not also a matter of common knowledge to the members of this court. This court can never permit a declaration of a state supreme court as to what is a matter of common knowledge to be controlling on any question of fact involved in a claim of violation of a federal right, whether under federal statute or under the federal constitution. To do so is to abdicate the power and duty finally to adjudicate on all federal questions.

Yates vs. Milwaukee, 77 U. S. (10 Wall.) 497, 505.
Minnesota vs. Barber, 136 U. S. 313, 321.

C.

THE EVIDENCE CONCLUSIVELY ESTABLISHES THE EXISTENCE OF COMPETING MONEYED CAPITAL AS DEFINED BY THIS COURT.

There are no *unincorporated* banks of deposit in Wisconsin, and, of course, there is no discrimination in favor of any such *incorporated* banks. There is nothing in the laws of Wisconsin, however, restricting to incorporated banks (1) the conduct of the business of banks of discount, (2) the employing of moneyed capital substantially as in the loan and investment features of banking, or (3) the employing of moneyed capital in making investments by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment.

The undisputed evidence establishes the conduct of such business and the employment of moneyed capital in large amounts in the manner indicated. All moneyed capital so

employed being wholly untaxed, any tax on shares of stock in national banks is necessarily in contravention of Section 5219.

First National Bank vs. Anderson, ... U. S. ..., 46 Sup. Ct. 135.

Wisconsin is an income tax state. There is no taxation whatever of other moneyed capital under the ad valorem system and hence no assessment rolls are available as would be the case if there were, not a total exemption, but merely a discrimination in rate. The evidence necessarily takes a form differing from that commonly met with in such cases as the *Richmond case.* While it differs in form, it goes far beyond that in the *Richmond case* or in any other case this court has had occasion to consider.

No new rule was announced in *Merchants' National Bank vs. Richmond,* 256 U. S. 635, as to the meaning of the words "moneyed capital" in connection with Section 5219. Nor did Congress in the re-enactment of that section on March 4, 1923, do more than to put into express words what was implied before.

First National Bank vs. Anderson, ... U. S. ..., 46 Sup. Ct. 135.

Section 5219 is to be read in the light of the purpose to protect these fiscal agencies of the national government against burdens which would "prevent the capital of individuals from freely seeking investment" therein, or which "would diminish their value as an investment and drive capital so invested from this employment."

Mercantile Bank vs. New York, 121 U. S. 138, 154, 155;

Amoskeag Savings Bank vs. Purdy, 231 U. S. 373, 390.

In other words, national banks are thus protected against competition for capital. In the last analysis, that is the whole purpose, since the ultimate result of competition is

the discouragement of the organization or continued existence of national banks. It is undisputed that in this respect state and national banks in Wisconsin face competition for capital in the form of investments exceeding many times their combined capital (R. 48, 49). A man with $10,000 to invest would have to face in a single year a tax of $300 if he invested in stock of the plaintiff bank against a tax of $17 or $18 if he put the money out at interest with a purpose to keep it so employed (R. 45, 46).

In *Merchants' National Bank vs. Richmond,* 256 U. S. 635, the evidence showed national bank stocks aggregating $8,000,000, stocks of state banks and trust companies of the value of $6,000,000, and bonds, notes and other evidences of indebtedness aggregating $6,250,000. The court said:

> "It is to be *inferred* that a substantial part of this aggregate was in the hands of individual taxpayers; the precise amount does not appear. It also was shown by evidence without dispute that moneyed capital in the hands of individuals invested in bonds, notes, and other evidences of indebtedness comes into competition with the national banks in the loan market." (Italics ours.)

Under the evidence in the case at bar it is not necessary to resort to any inference and here also it is shown by evidence without dispute that moneyed capital of this character comes into competition with national banks in the loan market. The evidence shows the loaning out to individuals by real estate firms of $250,000 or $300,000 annually (R. 27), the sale in the state by a single concern of 90% of $25,000,000 in a single year (R. 46), money invested in bonds and other investments and securities running into millions, a substantial portion of which is held by individuals (R. 48, 49), bonds and other investments many times exceeding that invested in national and state banks (R. 49), mortgages recorded in the county running in a single year to over $1,500,000 (R. 57), and outstanding mortgages sold to individuals by one dealer in Hartford amounting to $500,000. The

evidence also shows that these loaning concerns competed with the business of national banks the same as any other bank would (R. 27), that the withdrawal of funds for loans reduced deposits and directly affected the Bank's loaning department (R. 28, 29), that bond investments resulted in competition for capital (R. 48), and that investment houses came into competition with loans, especially short time loans (R. 49).

In contrast to this testimony we find from an examination of the record in the *Richmond case* (p. 47 of that record) that the only testimony on competition was that of the vice-president of the bank, who, after testifying generally that moneyed capital in the hands of individuals invested in bonds, notes and other evidences of debt came into competition with national banks, on being asked how this was, stated:

> "Our assets are invested in bonds, notes and other evidences of debt. The loan of money or the extension of credit is simply regulated, or largely regulated, by supply and demand. The more money there is to be loaned by individuals or corporations, the natural tendency is for a lower rate that a bank can get on a similar investment. In other words, the greater the competition, the lower the rate; the greater the demand, the higher the rate.
>
> "Q. Do the national banks lend money on notes secured by real estate? . . . .
>
> "A. Yes, they would take a note as collateral for another loan. Very often the loan would be paid off because of the fact that the collateral was taken up by the borrower and then the banks have to seek other channels for investment of their funds."

On this subject the *Richmond case* cannot be distinguished. We have referred at this point to a part only of the evidence on competition. It is set out fully in the statement of facts at pages 3 to 19 supra. The evidence is in no sense

of the word meager. It is not only undisputed but, read in the light of matters of common knowledge, is incontrovertible. The facts bearing on the question of competition were conclusively established.

Merchants' National Bank vs. Richmond, 256 U. S. 635;

First National Bank vs. Anderson, ... U. S. ...., 46 Sup. Ct. 135, 138.

We have stated above that there are no banks of deposit in Wisconsin. That is true in the technical sense of the word; and yet under the laws of Wisconsin it is possible for financial corporations other than banking corporations to carry on transactions which in the last analysis are of the same general character. Mr. Liver said that the Bank deals in bonds of organizations like the Wisconsin Farm Loan Association, which it buys for its own investments and to accommodate its clients, many of which are disposed of to individual clients (R. 26). At page 63 infra we have quoted the material portions of the Wisconsin statutes relating to the organization and supervision of the business of land mortgage associations. Under Section 2024-112 (Wis. Stats. 1921), land mortgage associations are given the power to make loans on first mortgages. They are also given the power to issue bonds and to secure the bonds so issued by the pledge of notes and mortgages taken. This means that such an association may have bonds outstanding far in excess of its original capital. The money raised by the issue of bonds secured by the pledge of notes and mortgages is reinvested and there is no limitation upon the extent to which this may be carried other than that involved in the restriction as to the percentage of value to which they may loan. This is not technically the receiving of deposits; and yet these operations are of a similar character and present the clearest and most conclusive form of competition.

It goes without saying that these organizations present competition also in the loan and investment market.

The testimony of Mr. Liver, president of the Bank, and of Mr. Schauer, secretary and treasurer of the Hartford Building & Loan Association, at pages 9 and 10 supra, clearly shows that in practical effect building and loan associations likewise present effective competition for deposits. We do not mean that the building and loan associations receive deposits in the technical sense of the word; and yet the manner in which they conduct their business clearly shows that the stockholders have substantially the same rights as holders of certificates of deposit. They have, it is true, some broader rights. But the building and loan association, in the receiving and handling of the great mass of its funds, operates so nearly in the same manner as does the bank in the receiving of deposits that it presents competition just as clearly as would another bank of deposit. The capital stock of the plaintiff Bank in this City of 4,000 is $50,000. On December 31, 1921 this building and loan association had outstanding paid up stock amounting to $77,502.71, and installment stock amounting to $43,691.85, a total of $121,194.06 (R. 55).

The undisputed evidence shows that there are, both in the City and in the State, competing financial enterprises. Some of these are corporations and some are partnerships, the shareholders or members of which are residents of Wisconsin (R. 50, 51). All of these clearly present competition for capital. We can easily understand how a man wishing to invest his money in a corporation or firm whose only capital would be money and whose only business would be the making of profit by its use as money might well choose to buy stock in an investment house in Wisconsin rather than to buy stock in a national bank. He would know that the dividends on his stock in a financial corporation would be exempt from tax in his hands, if he were a resident of Wisconsin, and that the taxes of the company would be measured by its income.

We might have a financial corporation and a national bank the aggregate values of the stock of which were identical. If both sustained a loss in any given year, the one would pay no tax, while the shareholders of the other would pay a very substantial tax. If both earned a net income, while both would pay taxes, the ad valorem bank stock tax would be certain to be many times the income tax paid by the other corporation.

Moneyed capital is also brought into competition where it is employed "substantially as in the loan and investment features of banking, in making investments, by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment."

First National Bank vs. Anderson, — U. S., —, 46 Sup. Ct. 135, at 138.

As applied to notes, bonds or other securities in the hands of individuals and employed, not in any business, but in the making of investments by way of loan, discount or otherwise with a view to sale or repayment and reinvestment, it reaches capital in the form of money which may be invested and employed by individual citizens "in many single and separate operations forming substantial parts of the banking business".

Mercantile Bank vs. New York, 121 U. S. 138, at 155.

To determine whether stock in non-banking corporations constitutes competing moneyed capital, we inquire whether the capital of the corporation is money and the object of its business is the making of profit by its use as money (*Mercantile Bank vs. New York*, 121 U. S. 138, at 157). To apply the latter test we inquire whether the capital is invested in securities by way of loan, discount or otherwise which from time to time according to the rules of business are reduced again to money and reinvested (ibid. 121 U. S. 157). If this be the business of a corporation or other association, then its shares of stock or the capital interests therein are moneyed

capital. To illustrate the application of that test, it excludes stock in mining, railroad, insurance and other mercantile corporations (*Talbott vs. Silver Bow County,* 139 U. S. 438, at 447, 448).

Its application here requires holding shares of stock and other capital interests in the many instances of financial enterprises, corporate and individual, shown to be in active business to be competing moneyed capital.

When the law was amended in 1868, the holding of corporate stock *by corporations,* as well as individuals, was seldom met with. Bank stock was a form of moneyed capital—but only *one* form. Discrimination in favor of any other form which might become competing was forbidden. We have just considered the test in dealing with corporate stocks. When we pass from corporate stocks to bonds, notes and other evidences of indebtedness, we immediately encounter money "at interest", all of which is potentially competing. Two men may hold bonds or notes of the same identical issue and yet theoretically these may be competing capital in the hands of one and not in the hands of the other. The test now is not the character of the property. Neither is it the business of the holder. It is the nature of its employment. It is not essential that it be employed in a business or in operations amounting to a business in direct competition with national banks. If we look upon the Act of March 4, 1923, c. 267, 42 Stats. 1499, as a codification of the decisions of this court, we must exclude "bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking *or* investment business *and* representing merely personal investments *not* made in competition with such business". Given a man engaged in the banking *or* investment business, all the moneyed capital he employs therein is competing moneyed capital. But even though a man be not engaged or employed in the banking or investment business, it is only that portion of his bonds, notes and

other evidences of indebtedness "representing merely personal investments *not* made in competition" with such business that are excluded. All the remainder must be looked upon as competing moneyed capital. As this act made no change in the law, the rule as to the sufficiency of the evidence remains the same as in the *Richmond case.* In that case the evidence showed a substantial amount of bonds, notes and other evidences of indebtedness. The court properly *inferred* that a substantial portion was in the hands of individuals and the testimony showed that it came into competition in the loan market. Neither through tax rolls or otherwise can these credits of individuals be classified as competing and non-competing. If that be a matter for proof, it must be one to be proven in a practical manner. It must be proven by the testimony of men familiar with general financial conditions and financial operations in the community or the state. The proof in this case shows competition, not merely in the loan market, as in the *Richmond case,* but in the investment market, in the field of deposits (in the practical rather than in the technical sense), and in nearly every field of banking.

It has always been held that moneyed capital includes private investments not used in the banking business. In the first case which arose under the Act of February 10, 1868, *Hepburn vs. School Directors* (1874), 23 Wall. 480, it was assumed by court and counsel that *the primary meaning of the words "moneyed capital" is money at interest.* In that case Hepburn held 60 shares of stock in a national bank of the par value of $100 per share. He was assessed thereon at a valuation of $150 per share. It was argued in effect that if a man loans $100 on a note, that constitutes moneyed capital of the value of $100, and that if he subscribes for $100 worth of stock in a national bank, that stock represents only $100 of moneyed capital, without regard to what the real value

of the stock may happen to be. In answer to that the court said:

> [23 Wall. 483] "It is contended that the term 'moneyed capital', as here used, signifies *money put out at interest,* and that as such capital is not taxed upon more than its par or nominal value, the par value of these shares is their maximum taxable value. (Italics ours.)
>
> "We cannot concede that money at interest is the only moneyed capital included in that term as here used by Congress. The words are 'other moneyed capital'. That certainly makes stock in these banks moneyed capital, and would seem to indicate that other investments in stocks and securities might be included in that descriptive term."

With particular reference to the argument that a hundred dollar share of stock represented only a hundred dollar investment of moneyed capital, the court answered:

> [23 Wall. 484] "The available moneyed capital belonging to a bank may be diminished by losses or increased by accumulated profits. Therefore some plan must be devised to ascertain what amount of money at interest is actually represented by a share of stock."

Court and counsel assumed that *its primary meaning was money put out at interest,* but reasoned that Congress must have meant something more than that—something more and not something less. That was because the use of the word "other" necessarily indicated that shares of stock in national banks must be deemed moneyed capital, and from this it must follow that the words "moneyed capital" might indicate investments in stocks and securities not commonly answering to the description "money at interest". That primary meaning of the words "moneyed capital" was never lost sight of, and it is that that is recognized in *Merchants' National Bank vs. Richmond,* 256 U. S. 635.

The application of the same general principle required the definite inclusion of farm mortgages as competing capital once the prohibition against loaning on farm mortgages by national banks was withdrawn and that field opened to them.

> *First National Bank vs. Anderson,* — U. S. —, 46 Sup. Ct. 135, 140.

There was no evidence in the *Richmond case* to the effect that the competing moneyed capital on which the decision turned was employed in business. A substantial part was inferred to be in the hands of individual taxpayers. It was also shown by evidence "that moneyed capital *in the hands of individuals invested in* bonds, notes, and other evidences of indebtedness" came into competition with the national banks "in the loan market". Actual *business* rivalry has never been the essence of this court's decisions. On the contrary, it has been repeatedly recognized that moneyed capital is brought within the rule by indirectly coming into competition with the business of national banks and the law of supply and demand in the loan and investment markets. Such competition from whatever source under the law of supply and demand vitally affects the main business of national banks, which is the loaning of money. Similarly, the greater the competition in the investment market for securities for the payment of money at interest, the higher the market prices become for such moneyed capital, and as the demand for these securities decreases the market values also go lower. Competition in the investment market under the law of supply and demand also affects the rates of interest obtainable by national banks upon loans. Every investment in a corporate bond or note is in reality participation in a loan to the issuing corporation, and corporations obtaining funds in this manner remove the necessity of their accepting any less favorable terms which national banks might offer.

It is and for years has been common practice in meeting needs of industrial and other corporations to issue unsecured notes or debentures under trust agreements containing covenants on the part of the issuing corporations for the protection of the note or debenture holders upon a breach of which such remedies as a judgment by confession and a receivership for the benefit of all the noteholders are available. These in the last analysis represent just so much unsecured commercial paper. They are often issued with varying maturities. Banks and individuals alike become investors in these securities. In other words, banks and individuals alike compete for this business. It is a common practice under collateral trust agreements to issue bonds or notes, the security back of which is not real estate but collateral of the same kind which is ordinarily taken by banks. These are sold to banks and to individuals alike. An industrial corporation having need, let us say, of $500,000, puts out one of these issues, and, with the proceeds of that issue, takes up the major portion of its bank loans. We say this is a matter of common knowledge. Financing is being done more and more by the investing public and the investing public are more and more becoming competitors of national banks.

This competition which banks must meet from corporations going into the investment market to obtain funds becomes so severe at times as to result in the taking up of existing bank loans with funds thus secured by the debtor corporations through the issuance of new securities in the open market, which are largely absorbed by the public generally. How this is being done in Wisconsin is apparent from the testimony of Mr. Grove, which is abstracted in the statement of facts.

Direct competition in the investment market between national banks, and persons and corporations generally, who employ their surplus funds therein, is too substantial and commonly known to be ignored.

It appears from the 1924 Annual Report of the Comptroller of the Currency (p. 44) that approximately one-third (1/3) of the investments of national banks consists of railroad, public service corporation, and other bonds and collateral, trust and other corporation notes.

See Appendix F.

As we understand it, judicial notice may be taken of this report.

Tempel vs. United States, 248 U. S. 121, 130.
Heath vs. Wallace, 138 U. S. 573, 584.

The comptroller of the currency has never disapproved of such investments by national banks, which would be the natural thing if these were *ultra vires.* It was stated in his 1924 Report (p. 12) that "a great number of national banks now buy and sell investment securities, and the office of the comptroller has raised no objection because this has become a recognized service which a bank must render".

The sanction of the law to the well-known practice of national banks to invest their funds in corporate bonds and notes is contained in Section 5136, Subdivision 7 of the National Bank Act under which they are given the power to carry on the business of banking among other things "by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt".

The reasoning of the opinion in *Newport National Bank vs. Board of Education,* 114 Ky. 87, 70 S. W. 186, on the subject of the express statutory power of national banks to invest their funds in corporate bonds is, we respectfully submit, unanswerable.

At this point we have drawn verbatim largely from a brief lately presented to the Court of Appeals of the State of New York by Mr. Martin Saxe of the City of New York.

To summarize the evidence on competition, it shows that the Bank meets competition from individuals and concerns engaged in selling notes, mortgages, securities and bonds (R.

26, 27, 28, 47, 49, 50, 57), from individuals and concerns engaged in the loan business (R. 27, 30, 39, 57, 65), from real estate firms in the loaning business (R. 27, 30), that these loaning concerns compete as do other banks (R. 27), that this competition reduces the Bank's loaning power (R. 28, 45, 49), reduces deposits (R. 28) and presents competition for capital (R. 48, 50, 51), that it meets competition through individual mortgage investments (R. 57), that it meets building and loan association competition similar to that of a bank (R. 29), that it meets in various forms competition through the substantial equivalent of the conduct of the business of a bank of deposit (R. 29, 39, 53), that it meets competition for investment in government, municipal, farm loan and other bonds (R. 39, 40, 56), that it meets competition in its federal farm loans (R. 45), that it meets competition in the sale of bonds (R. 51) and from investment and bond houses (R. 47, 48), through the discounting of commercial paper by acceptance companies (R. 50), through dealers in foreign exchange (R. 50), building and loan competition both in the loaning field (R. 52, 55) and in the deposit field (R. 53, 54), that loans through loaning concerns cause losses to the banks (R. 39), and that the competing capital is large and substantial (R. 27, 29, 49), and competes generally throughout the state (R. 30).

D.

PROPER LIMITATION OF STATE TAXATION WITH REFERENCE TO STOCK IN JOINT STOCK LAND BANKS AND IN NATIONAL AGRICULTURAL CREDIT CORPORATIONS AND OF DEBENTURES AND OTHER OBLIGATIONS OF THE LATTER REQUIRE ADHERENCE TO ORIGINAL MEANING OF WORDS "OTHER MONEYED CAPITAL".

Joint stock land banks are empowered to carry on the business of "lending on farm mortgage security and issuing farm loan bonds".

Act of Cong., July 17, 1916, c. 245, Sec. 16, 39 Stat. 374.

On the subject of taxation with reference to joint stock land banks, this Act provides:

> "Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the bank is located; but such assessment and taxation shall be in manner and subject to the conditions and limitations contained in section fifty-two hundred and nineteen of the Revised Statutes with reference to the shares of national banking associations."
>
> *Act of Cong., July 17, 1916, c. 245, Sec. 26, 39 Stat. 380.*

By a reference in Section 16, Chapter 245 of the Act of Cong., July 17, 1916, to the powers of federal land banks, which are set out in Section 14 of the same act, the powers of joint stock land banks are very much broadened (*Act of Cong., July 17, 1916, c. 245, Sec. 16, 39 Stat. 375.*) The powers of the joint stock land bank are much broader in certain respects than the powers of national banks. The joint stock land bank was brought into existence in order to provide an agency for the making of loans which in many parts of the country were made mainly by individuals. If independently of the Joint Stock Land Bank Act, the words "other moneyed capital" in Section 5219 must be read with the addition thereto of the words "coming into competition with the business of national banks", then to accomplish the purposes of that act the latter phrase must now be broadened so as to read "coming into competition with the business of national banks *or with the business of joint stock land banks*".

Under Section 203 of the Agricultural Credits Act of 1923, providing for the formation of national agricultural credit corporations, such corporations are given power to issue collateral trust notes or debentures with a maturity not exceed-

ing three years and to pledge as security therefor any notes, drafts, bills of exchange or other securities held by them.

Section 211 of that act reads as follows:

> "*Taxation* by a State of the shares in National Agricultural Credit Corporations, or of dividends derived therefrom, or of the income of said corporations, or real estate owned by them, *shall be such* only *as is or may be authorized by law in the case of national banking associations;* and *taxation* by a State *of the debentures or other obligations* of such corporations *shall not be at a higher rate than* the rate applicable to *other moneyed capital in the hands of individual citizens* thereof." (Italics ours.)
>
> *Act of Cong., March 4, 1923, c. 252, title II, Sec. 211, 42 Stat. 1469.*

This statute treats the *shares of stock in* such a corporation and the *debentures or obligations issued by* such a corporation in exactly the same manner for the purposes of state taxation. In each case the test is the rate imposed on "other moneyed capital in the hands of individual citizens". It is clear that Congress, in prescribing a limitation with respect to taxation of *debentures and other obligations* of one of these corporations had in mind at least a comparison with *similar obligations, corporate or individual, of all kinds.* If there were doubt before, there can be no doubt since the enactment of this statute as to what Congress considered to be other moneyed capital in the hands of individual citizens. It must include at least all bonds, notes or other evidences of indebtedness or other obligations of any kind that might come into competition with the debentures and other obligations of a national agricultural credit corporation.

V.

THE STATE SUPREME COURT WAS IN ERROR IN ITS DECLARATION ON COMMON KNOWLEDGE.

We venture to say that no case will come before this court in which evidence introduced for the purpose of showing the existence of competing capital will be controverted. It may be meager, as in the *Richmond case,* or it may be overwhelming, as here, but it will not be contradicted.

Against the declaration of the majority of the State Supreme Court on that subject put forth as a matter of common knowledge, we cite (1) the act of the legislature after the amendment of Section 5219 by the Act of March 4, 1923, which assumes the existence of competing capital, (2) the act of the legislature in providing for land mortgage associations, which are clearly competing enterprises, (3) the act of the legislature in providing for so-called investment, loan and guaranty companies, which must also be competing enterprises, (4) the act of the legislature in committing to the Railroad Commission, which is the public utility commission of Wisconsin, the regulation of the issue and sale of securities constituting moneyed capital, and the regulation of brokers, corporate or individuals, clearly engaged in competing business, (5) the report of that division of the commission showing the authorization for sale within the state during the year ending June 30, 1921, of $115,000,000 of corporate bonds, and (6) the opinion of the three dissenting members of the Supreme Court voiced by the Chief Justice.

In connection with the claim that it is a matter of common knowledge that there is no competing capital in the State of Wisconsin, we may properly take the testimony of the Wisconsin Legislature of 1923. At the time of the passage of the Act of March 4, 1923, amending Section 5219, the only moneyed capital in the State of Wisconsin subject to taxation

on the ad valorem basis consisted of shares of stock in banks and banking associations. The method of taxation was dealt with under Sections 70.31, 70.37, 70.38, 70.39 and 70.40. By Chapter 391, Laws of 1923, approved July 12, 1923, the legislature of Wisconsin attempted to make these statutes conform to the Act of March 4, 1923, by broadening the definition of the words "banks" and "banking associations" as found in the sections in question.

The method of taxation of shares of stock in banks and banking associations was prescribed by Subdivision (2) of Section 70.31. Let us analyze that subdivision by reading into it (in italics) the new definition of the words "bank" or "banking association". As so analyzed the subdivision in question reads as follows:

"All the shares of stock of

(1) every bank or banking association whether organized under the authority of any law of this state or of any act of the congress of the United States [and]

(2) *all corporations, associations, partnerships and individuals engaged in the banking or investment business and employing moneyed capital in competition with the business of national banks; provided, that bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing investments not made in competition with such business shall not be deemed moneyed capital* * * *

(3) shall be assessed and taxed in the assessment district in which such bank, *banking association, corporation, association, partnership or individual* is located for the transaction of business."

Here the legislature of Wisconsin, speaking just seven months before the court, assumes and declares that there are (1) corporations, associations, partnerships and individual citizens engaged in several features of the banking business not restricted by the laws of the state to incorporated banks, (2) others engaged in the investment business who are employing moneyed capital "in competition with the business of national banks", and (3) bonds, notes and other evidences of indebtedness in the hands of individual citizens representing investments in fact made in competition therewith, as that language is defined by this court. We respectfully submit that this court may properly look to this declaration of the legislature of Wisconsin composed of men coming from every walk of life and from every section of the state for the accepted fact of the existence in Wisconsin of a substantial amount of other moneyed capital within the meaning of Section 5219 in addition to that invested in shares of stock in national banks. This pronouncement of the legislature of the State of Wisconsin cannot be wiped aside. The State Supreme Court may not take judicial notice of a general condition contrary to that of which the legislature took notice. If the legislature, turning to the composite knowledge of its membership, declares the existence of other moneyed capital answering to the description of Section 5219, *as defined prior to* the Act of March 4, 1923, yes, and *as defined in* the Act of March 4, 1923, that should not be permitted to be wiped aside by a declaration that the Supreme Court of the State takes notice that the facts are to the contrary.

Almost immediately following the statutes pointed to by the Supreme Court of Wisconsin as restricting the business of banking to incorporated banks are found Sections 2024-100 to 2024-146, Wis. Stats. 1921, entitled "Land Mortgage Associations". These sections provide for the organization and supervision of the business of "land mortgage associa-

tions". The powers of these associations are set out as follows in Section 2024-112:

> *"Corporate powers.* SECTION 2024-112. Said land mortgage association shall have power:
>
> (1) To make loans, the conditions of which shall be approved by the commissioner of banking if the security taken therefor is to be used as the basis for a bond issue under subsection (3), and to accept as security for any such loan a first mortgage upon improved or partially improved agricultural lands, within this state. * * *
>
> (3) To issue bonds secured by the pledge of the mortgage so taken or purchased.
>
> (4) To pledge the notes and mortgages so taken or purchased under the provisions of subdivisions (1) and (2) hereof as security for the bonds of the land mortgage association referred to in subdivision (3) hereof."

Section 2024-141 provided that when six land mortgage associations shall have been incorporated they shall form a council to be known as "Wisconsin Land Mortgage Association Council", to consist in the first instance of one stockholder from each association to be elected by the Board of Trustees thereof.

Section 2014-27, which appears in the chapter immediately preceding the chapter on banks and banking, provides for the supervision and control of "investment associations" and indicates certain conditions upon which persons, co-partnerships, associations and corporations may engage in the investment and loan business. That section reads as follows:

> *"Regulation.* SECTION 2014-27. No person and no co-partnership, association or corporation, whether local or foreign, heretofore organized or which may hereafter be organized, *doing business as a so-called investment, loan,* benefit, co-operative, home, trust or *guarantee company,* for the licensing, control and management of which

there is no law now in force in this state, and which such person, co-partnership, association or corporation, *shall solicit payments to be made to himself or itself either in a lump sum, or periodically, or on the installment plan, issuing therefor so-called bonds, shares, coupons, certificates of membership or other evidences of obligation or agreement,* or pretended agreement to return to the holder or owners thereof money or anything of value at some future date, shall solicit or transact any business in this state unless such person, co-partnership, association or corporation, shall have first complied with all the provisions prescribed in chapter 93 of the statutes required of foreign building and loan associations authorized to do business in this state." (Italics ours.)

In 1919 the legislature of Wisconsin passed an act providing for the regulation of the issue and sale of securities and placed the administration of the law in the hands of what is referred to as the Securities Division of the Railroad Commission. This law appeared on the Statutes in 1921 as Sections 1753-48 to 1753-61, both inclusive. This law provided in express terms for the engaging in competing businesses of persons, firms and corporations, and provided for a specific legal authorization of their conduct. Sections 1753-48 and 1753-52, so far as material, read as follows:

"*Definitions.* SECTION 1753-48. As used in sections 1753-48 to 1753-68, inclusive, the following words shall be understood in the sense herein set forth and defined:

* * * * *

(c) 'Security' or 'securities' means and includes any *bonds, stocks, notes or other obligations or evidences of indebtedness* or of title to, interest in or lien upon any or all of the property or profits of a company; and the *notes or other obligations or evidence of indebtedness* of an individual.

(d) 'Broker' means and includes every person, firm or corporation, other than an agent, who in this state engages either wholly or in part in *the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in any security or securities issued by others, or of underwriting any issue of securities, or of purchasing or otherwise acquiring such securities* for another for compensation or of purchasing or otherwise acquiring such securities with the purpose of reselling them, or of offering them for sale to the public for a commission or at a profit; (italics ours)

* * * * * *

(f) 'Sale' means and includes every disposition of a security which may be made for value, and any securities given or delivered with, or as a bonus on account of any purchase of securities or any other thing shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value."

"*Certification of brokers and agents.* SECTION 1753-52. 1. No person, firm or corporation shall act as a broker until such person, firm or corporation shall have first applied for and secured from the commission a certificate authorizing such person, firm or corporation to act as a broker. * * *"

(Here follow provisions relative to the application and the passing thereon by the commission.)

To emphasize our argument on the question of judicial notice, we beg leave to cite another department of the state government. This court cannot take judicial notice of the records of the Railroad Commission of Wisconsin. But when we are confronted with a statement of the Supreme Court of Wisconsin that the findings of the trial court based upon evidence may be wiped aside as a matter of common knowledge, we feel justified in referring to the reports of the Railroad Commission of Wisconsin, not for evidence of the existence of

competing moneyed capital, but for a conclusive refutation of the declaration as to what are matters of common knowledge in Wisconsin. The annual report of the Securities Division under the law last mentioned, covering the year from July 1, 1920, to June 30, 1921, shows the authorization by that Commission of the sale of Class A bonds (to say nothing of preferred stock) *in Wisconsin* to the amount of $111,162,200, and of Class B bonds to the extent of $4,843,000. Undoubtedly, some part of these bonds may have passed into the hands of national banks. We do not claim that proof that the sale was authorized establishes that the sales were actually made; but it is a fair assumption that Wisconsin was deemed a field for the sale within a single year of over $115,000,000 worth of bonds. If that be true for a year, what must it show as to the bonds already in the hands of the investing public?

In conclusion, we call attention to the fact that the seven men on the supreme bench of Wisconsin divided three to four as to what is a matter of common knowledge. The three declare in effect that if there were no evidence on the subject, matters of common knowledge would require them to make the same finding which was made by the trial court (See dissenting opinion, R. 90 to 95).

VI.

THE STATE SUPREME COURT PROCEEDED UPON A MISUNDERSTANDING OF THE DECISIONS OF THIS COURT.

A.

THE MAJORITY OPINION SQUARELY CONFLICTS WITH THE DECISION OF THIS COURT IN THE RICHMOND CASE IN HOLDING THAT ASIDE FROM STOCK IN INCORPORATED BANKS MONEYED CAPITAL INCLUDES ONLY CAPITAL USED IN PRIVATE BANKING.

The majority opinion proceeds on the assumption that prior to the enactment of the income tax law the business of banking in Wisconsin had by statute been "strictly confined to national banks and *corporations organized under the banking laws of the state*" (R. 75), and that as shares of stock in these corporations are classed with shares of stock in national banks there is no violation of Section 5219. That is another way of saying that aside from shares of stock in incorporated banks there can be no moneyed capital within the meaning of the statute except that employed in private banking. As appears from the discussion of the *Richmond case* (*Merchants' National Bank vs. Richmond*, 256 U. S. 635), quoted at p. 39 supra, the State Supreme Court assumed that this court had before them in the record some proof that the bonds, notes and other evidences of indebtedness therein referred to were in the hands of private bankers. In anticipation of any argument that might be so made we had procured and placed at the disposal of the court a transcript of the record before this court in the *Richmond case*. A comparison of the evidence in the two cases shows that we went far beyond the showing made in the *Richmond case*. So striking was this that we felt constrained to make plain that we had not the transcript at the time of the trial. There was no evidence in the *Richmond case* to the effect that the bonds, notes and other evidences of indebtedness upon the discrimination

in favor of which the case turned were either wholly or partly in the hands of private bankers or used in the banking business. Neither was the evidence on competition so limited. In these respects there is no difference whatever between the two records. Indeed, the record in the case at bar is far stronger on competition. The two cases cannot be so distinguished.

If the evidence in the record in the *Richmond case* were looked upon as leaving in doubt the question whether the $6,250,000 of bonds, notes and other evidences of debt on the discrimination in favor of which the case turned were wholly or partly in the hands of private bankers, the question would still be put at rest by reference to the laws of Virginia, from which it appears that private bankers paid a license tax and were not subject to an ad valorem tax upon their capital.

In the Virginia case of *Commonwealth vs. Hutzler,* 124 Va. 138, decided on January 16, 1919, two months before the first decision in that court in *Richmond vs. Merchants National Bank of Richmond,* 124 Va. 522, arising on writ of error to the Hustings Court of Richmond, it appeared that Hutzler, doing business as a private banker, was assessed with and paid for the year 1915 *a state license tax* measured by the capital employed in his banking business pursuant to the provisions of Sections 77 and 78 of the statutes of that state, commonly known as the Tax Bill.

For the same year he was assessed with *an ad valorem state tax* on such capital. The Hustings Court on his application, being of the opinion that the assessment was erroneous, entered a judgment exonerating him from the payment of the ad valorem tax and a writ of error was sued out to review that judgment. The court said, among other things:

> "* * *, we are constrained to conclude that *the very substantial license tax imposed on private bankers* by Section 78 of the Tax Bill, specifically and exclusively measured 'on the capital,' *must be regarded* not merely as a privilege tax, but *as a charge upon the capital itself.*

> If this be true, *the additional assessment* under Section 8 of Schedule C, being upon 'capital otherwise taxed,' *was plainly unlawful, and the defendant in error was properly exonerated from its payment.*" (Italics ours.)

The discrimination complained of in the *Richmond case* was the taxation of bonds, notes and other evidences of indebtedness on the ad valorem system and at a lower rate. If they were so taxed they could not have been in the hands of private bankers.

The conclusion that private banking has been eliminated in Wisconsin is based in the main on Sections 2024-78*l* and 2024-78*m*, Wis. Stats. 1921. These statutes are aimed against the carrying on of the business of a bank of deposit and were sustained on that theory. They read:

> "**Banking, defined.** SECTION 2024-78*l*. The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, copartnership, association, or corporation, shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing, provided that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal.
>
> "**Banking, unlawful, without charter; penalty.** SECTION 2024-78*m*. It shall be unlawful for any person, copartnership, association, or corporation to do a banking business without having been regularly organized and chartered as a national bank, a state bank, a mutual savings bank, or a trust company bank. Any person or persons violating any of the provisions of this section, either individually or as an interested party in any copartnership, association, or corporation shall be guilty of a misdemeanor and on conviction thereof shall be fined in a sum not less than three hundred dollars nor

more than one thousand dollars, or by imprisonment in the county jail not less than sixty days nor more than one year, or by both such fine and imprisonment."

"**State banks; time limited for reincorporation.** SECTION 2024-78*n*. Any person, copartnership, association or corporation doing business in this state as defined in sections 2024-78*l*, 2024-78*m* and 2024-78*n*, may incorporate as a state bank and may convert into a state bank, on or before September 1, 1909, as provided in section 2024-55 of the statutes."

Within a year after the enactment of this statute, two cases were presented to the Supreme Court of Wisconsin testing its validity,—*MacLaren vs. State*, 141 Wis. 577, supra, and *Weed vs. Bergh*, 141 Wis. 569. The legislative restriction was upheld, the statute being construed as applying only to the conduct of the business of a bank of deposit. In *MacLaren vs. State*, 141 Wis. 577, the court quoted from *Oulton vs. Savings Inst.*, 17 Wall. 109, 118, to the effect that banks in the commercial sense are of three kinds—(1) of deposit; (2) of discount, and (3) of circulation. It was pointed out that the term "banking" might include all of these activities, but that it might also be used in a more narrow and restricted sense. [141 Wis. 581] "There is no doubt as to the sense in which the legislature intended to use the term here, because it says that the receiving of deposits as a regular business shall constitute banking." And again, [141 Wis. 582] *"The main purpose of regulating the banking business as the business is now carried on is to insure the safety of deposits."* In sustaining the act in question in *Weed vs. Bergh*, 141 Wis. 569, the Supreme Court specially referred to *MacLaren vs. State*, 141 Wis. 577, for its discussion of the scope of the act under consideration.

It is stated in the majority opinion (R. 87) that dealers in bonds, mortgages and securities are not in Wisconsin permitted to use the word "bank", "savings bank", or "banker",

or the plural thereof upon any office sign or on any letterhead or other written or printed matter (Section 2024-50, Wis. Stats. 1921). Grant that they may not call themselves "bankers", it does not follow from that that they or any other individuals or corporations are forbidden to engage in the business ordinarily carried on by banks of discount. In determining whether for the purposes of the test of competition, which has been read into Section 5219, an individual is deemed to be employing his investments in banking business, we are to look to what he does and not to the sign on his office door or to his letterhead. The same is true of a corporation which is engaged in the same kind of business. The statute pointed to as eliminating private banking is aimed at *banks of deposit* and not at banks of discount. There is nothing to prevent an individual from carrying on all the business commonly carried on by a bank of discount and in doing so from employing any amount of moneyed capital in that business. The moment he employs any moneyed capital in that business, that moneyed capital is brought into competition with the business of national banks.

In *First National Bank vs. Anderson*, ... U. S. ..., 46 Sup. Ct. 135, at 138, this court used the following language, which might well be used in the case at bar:

> "The defendants took the position that the congressional restriction was directed only against discrimination in favor of state banking associations, and they persisted in it to the extent of making no effort at the trial to controvert the evidence produced by the plaintiff to show that a relatively large amount of moneyed capital, taxed at a lower rate than the bank's shares, was employed in substantial competition with the business of the bank."

B.

THE DISCUSSION IN THE MAJORITY OPINION CONFLICTS GENERALLY WITH THE DECISIONS OF THIS COURT.

Most of what might properly be dealt with separately under this heading has been discussed at various points in the course of this brief. What we can best do here is to summarize the misconceptions of the law which appear in the course of the majority opinion. We beg leave to point out that the trial court persisted in the view that the discrimination aimed at was that in favor of state bank shares and quoted a statement from the Congressional Record made in 1868 tending to support that view (R. 84, bottom), notwithstanding that it has repeatedly been held otherwise; followed a narrow and technical definition of competition (R. 84, bottom); unjustifiably restricted their view of the evidence supporting the finding of the trial court (R. 85); wholly disregarded the evidence as to the manner in which building and loan associations are now in fact operated (R. 86); failed to appreciate in dealing with brokers and dealers in bonds, mortgages, securities and acceptance companies (R. 86, 87) that the rule does not require that the business be done in the same manner in which it is done by national banks, and that the competition may be the more effective where the competing individual or concern has greater latitude in his or its dealings; proceeded on the erroneous theory that investments of individuals in order to be competing must be "made as a business" (R. 88); sought the test of competition in *unfriendly discrimination* or a *hostile attitude* on the part of the state; and concluded against a finding of discrimination because (as, without evidence, they declared the fact) national banks are prosperous (R. 89) and (also without evidence) there is no moneyed capital *"bidding for business which national banks are authorized to do"* (R. 90).

The State Supreme Court erroneously followed the holding of the Supreme Court of Appeals of Virginia in the *Richmond case*, which this court reversed, stating:

> [256 U. S. at p. 638] *"The Supreme Court of Appeals entertained the view that the purpose* of § 5219, Rev. Stats., *was confined to the prevention of discrimination* by the States *in favor of state banking associations,* as against national banking associations, and that since none such is shown here there was no repugnance to the federal statute. *This, however, is too narrow a view of § 5219* (citing *Boyer vs. Boyer,* 113 U. S. 689, 691-692, and quoting the statutory restriction.)". (Italics ours.)

Erroneously, the Supreme Court of Wisconsin has drawn from the opinions of this court in the bank stock tax cases cited and discussed, the view that moneyed capital, to come within Section 5219, must be employed *in a business* (R. 89) directly competitive for business with national banks. This is only part of the rule established by this court and refers merely to when shares of stock in corporations in the hands of individuals, or capital interests owned by individuals in unincorporated concerns, constitute moneyed capital.

The other part of the rule laid down in the *Richmond case,* and the prior decisions therein cited, was lost sight of. It clearly includes the investments of individual citizens, regardless of the nature of their business, in securities for the payment of money at interest, which investments come into competition, under the law of supply and demand, with the business of national banks in the loan and investment markets, and, for that matter, for capital itself.

The dissenting justices recognized this distinction in the applicable tests. In the able dissenting opinion, the error of the majority opinion was pointed out by quoting the true rule from the *Richmond case,* since reaffirmed in the decision in *First National Bank vs. Anderson,* ... U. S. ..., 46 Sup. Ct. 135. A brief extract from the dissenting opinion will

suffice, which, except for the first three words, is taken from the *Richmond* opinion:

> [R. 94] "this 'moneyed capital' 'included money in the hands of individuals employed in a similar way *invested* in loans or in securities for the payment of money either as an *investment* of a permanent character or temporarily with a view to sale or repayment and reinvestment.'" (Italics ours.)

To take a narrow view of the business of a national bank and then to consider only that moneyed capital which is used in the same identical manner is to defeat the purpose of the law. There is a greater need for protection against competition where the competitor is not restricted as is the bank itself.

CONCLUSION.

To give to the words "moneyed capital" in Section 5219 the interpretation adopted in the State Supreme Court is to emasculate the statute. It means going back to 1868 and reversing the action of Congress and preserving the test of comparison with state banks and rejecting the test of comparison with other moneyed capital. It means the rejection of the primary meaning of other moneyed capital as money at interest. It means the removal of safeguards erected against discrimination not merely against national banks and in favor of state banks but against national banks and state banks and in favor of other forms of financial investments. Ours is a federal government in which the powers necessary and essential to national life have been given to the central government. Its founders realized that the national government must have the power to provide for a national currency and this is apparent from the constitution. With prophetic vision the builders in this court in an early day recognized that agencies of the national government must be free from control or interference by the state governments. The part that banking

institutions would ultimately play in the life, the welfare and the preservation of the government was properly not foreseen, but it was held that if the United States created a banking institution to operate as an agency of the national government there could not with safety be recognized in the states any power to tax that agency. It was, of course, reasonable for the national legislature to permit states to tax national banks or shares of stock therein within limitations by it prescribed, which limitations could be changed from time to time as the wisdom of modifications might be demonstrated by experience. So it was that Congress permitted the states at first to tax national bank stock provided they imposed no greater burden thereon than they imposed on state bank stock. In 1868, deeming that sufficient protection was not given if the states were limited in the tax burden only by that which they might impose on other bank stock, Congress amended the law and limited the states to an imposition of a tax burden not exceeding that imposed on other moneyed capital. It was not the purpose of Congress to prescribe the method of taxation which the states might adopt, but it was the purpose of Congress to exact a test which could only be applied under an ad valorem system of taxation or under a system in which the tax imposed could readily be reduced for the purposes of comparison to the terms of an ad valorem tax. In 1911 Wisconsin abandoned ad valorem taxation and went over to income taxation so far as intangibles are concerned. Indeed, the purpose then was to abandon ad valorem taxation entirely as to personal property. After that time it became the purpose of the state to exempt all moneyed capital in general and to impose an ad valorem tax only in special cases. Exemption was no longer the exceptional thing. Taxation became the exceptional thing. The state affords no basis for the application of the old test. Congress seeing the necessity for adapting the permissive power to tax to new conditions has since made it possible for states to tax the shares of stock on the ad valorem basis,

or the income of the bank or the dividends received by the stockholder as part of his income, prescribing a separate test in respect to each. While the case at bar arose before the amendment of March 4, 1923, and therefore does not require a determination in respect thereto, we think it proper to say that according to our view Congress intends now to require that while the states may choose any one of these three methods of taxation, they must choose that method which permits under their respective laws of the application of the test appropriate thereto. Where a state abandons ad valorem taxation as to moneyed capital in general and adopts income taxation, the application of the ad valorem test is idle. A free choice is given to the state legislature, and that character of law should be adopted in which the purpose to comply with the limitations prescribed by the Act of Congress will be apparent on the face of the law itself.

Respectfully submitted,

GEO. P. MILLER, EDWIN S. MACK, ARTHUR W. FAIRCHILD AND J. GILBERT HARDGROVE,

Counsel for Plaintiff in Error.

E. W. SAWYER,

Of Counsel.

APPENDIX A.

Section 5219, United States Revised Statutes, prior to amendment of March 4, 1923.

"Sec. 5219. (State taxation.) Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other money capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed. (R. S.)"

APPENDIX B.

Act of March 4, 1923.

"An act to amend Section 5219 of the Revised Statutes of the United States.

That Section 5219 of the Revised Statutes of the United States be, and the same is hereby amended so as to read as follows:

Sec. 5219. The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all of the shares of na-

tional banking associations located within its limits. The several States may tax said shares, or include dividends derived therefrom in the taxable income of an owner or holder thereof, or tax the income of such associations, provided the following conditions are complied with:

1. (a) The imposition by said State of any one of the above three forms of taxation shall be in lieu of the others.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations, nor higher than the highest of the rates assessed by the taxing state upon the net income of mercantile, manufacturing, and business corporations doing business within its limits.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares or the net income as above provided of any national banking association owned by non-residents of any State, or the dividends on such shares owned by such non-residents, shall be taxed in the taxing district where the association is located and not elsewhere; and such associations shall make return of such income

and pay the tax thereon as agent of such non-resident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of Section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section." (42 Stat. L. 1499.)

APPENDIX C.

Wisconsin Statutes of 1921 relating to assessment and taxation of bank stock.

70.31. **Bank stock, assessment.** (1) The president, cashier or other officer in charge of any bank, shall make out and deliver to the assessor annually on or before the first day of June a verified statement showing the number and par value of the shares of stock, the names and residence of each stockholder therein on the preceding first day of May and the amount of stock owned or held by him on that day.

(2) All the shares of stock of every bank or banking association, whether organized under the authority of any law of this state or of any act of the congress of the United States shall be assessed and taxed in the assessment district in which such bank is located for the transaction of business.

(3) The shares of stock in any bank shall be liable to assessment and taxation as personal property and shall be entered upon the assessment roll in the names of the several owners, separately from the assessment of

other personal property assessable to such owners. The valuation of such shares of stock and the taxes thereon shall be separately entered in the tax roll.

70.37. **Assessment, how made; deductions.** In the assessment of shares of stock in any bank the assessor shall first determine the total true cash value of all such shares according to his best judgment. If the building in which such bank maintains its offices and transacts its business be owned by such bank, the assessed value thereof, including the land upon which it is located, if owned by such bank, not exceeding the amount for which such building and land are carried as an asset upon the books of the bank, shall be deducted from the total value of such shares. The remainder of such total value or the whole thereof, if the bank does not own such building, divided by the total number of such shares, shall be taken as the valuation for assessment of each of such shares. No deduction shall be made on account of any other real estate in the assessment of the shares of stock of any bank.

70.38. **Tax a lien on shares of stock; levy and sale.** (1) The taxes levied upon the shares of stock in any bank shall be a lien upon such shares from the time of the assessment on the preceding first day of May, which lien shall be prior to all other claims or liens. Such taxes and the lien therefor may be enforced by any officer having authority to collect such taxes by levy upon and sale of such shares of stock under his warrant for the collection thereof.

(2) Such levy may be made by delivering to the president or cashier of such bank, or to any other person who has at the time the custody of the books and papers thereof, a notice referring to such warrant and stating that by virtue thereof he thereby levies upon such shares of stock, designating the number of such shares, the name of the person to whom assessed and the amount of taxes

thereon, for the purpose of making sale thereof to satisfy such taxes in the manner provided by law.

(3) In making sale of such shares under such warrant it shall not be necessary for such officer to exhibit or have in his possession the certificates or other evidences of such shares. Upon making such sale the officer shall issue duplicate certificates of sale in the manner specified in Section 2990 of the statutes and the purchaser at such sale shall be entitled to all the rights and remedies given in said Section 2990 to purchasers of shares of corporate stock upon sale under execution.

70.39. **Bank may pay tax on stock.** Any bank is authorized to pay such taxes on the shares of stock in such bank and shall have a lien from the preceding first day of May upon the shares of stock for the amount of the taxes so paid with interest and for any costs or expenses incurred therewith or any such bank may at its option pay such taxes for all the stockholders in such bank out of its earnings or other available resources as the expenses of such bank.

70.40. **Exemption.** The taxation of the shares of stock in banks as provided in Sections 70.31, 70.37, 70.38 and 70.39, shall be in lieu of all taxes upon the capital, surplus, property and assets of such banks, except that no real estate owned by any bank or banking association or constituting the whole or any part of its capital, surplus or assets shall be exempt from taxation.

APPENDIX D.

Wisconsin law of 1923 designed to conform Wisconsin statutes to Act of Congress of March 4, 1923.

CHAPTER 391, LAWS OF 1923.

AN ACT to amend Section 70.37 and to create Sections 70.404 and 70.405 of the statutes, relating to the taxa-

tion of banks or banking associations and corporations, partnerships, and individuals employing moneyed capital in competition with national banks.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. Section 70.37 of the statutes is amended to read: 70.37. In the assessment of shares of stock in any bank the assessor shall first determine the total true cash value of all such shares according to his best judgment. If * * * such bank * * * *owns any real estate which is separately assessed, the assessed valuation thereof, not exceeding the amount for which the same is included in determining the total true cash value of such bank shares,* shall be deducted from the total value of such shares. The remainder of such total value or the whole thereof, if the bank does not own * * * *real estate,* divided by the total number of such shares, shall be taken as the valuation for assessment of each such shares * * *.

Section 2. Two new sections are added to the statutes to read: 70.404. For the purposes of Sections 70.31, 70.37, 70.38, 70.39, 70.40 and 70.405, the term "bank" or "banking association" shall include all corporations, associations, partnerships, and individuals engaged in the banking or investment business and employing moneyed capital in competition with the business of national banks; provided, that bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section, and any tax paid under the provisions of said Sections 70.31, 70.37, 70.38, 70.39 and 70.40 shall be in lieu of any income tax upon income derived from such business.

70.405. If it shall be finally adjudicated or determined that the provisions of Sections 70.31, 70.37, 70.38, 70.39, 70.40 and 70.404 are invalid in application to national banks, each bank or banking association and all corporations, associations, partnerships and individuals included under the term "bank," or "banking association," by Section 70.404, shall be assessed and taxed respectively from and after the taking effect of this section in lieu of the tax under said sections in the same manner as other corporations, associations, partnerships and individuals under the provisions of the income tax law in force during the period after the taking effect of this section. This section shall apply to the 1923 and subsequent assessments.

Section 3. This act shall take effect upon passage and publication.

Approved July 12, 1923.

APPENDIX E.

Wisconsin statutes of 1921 exempting other moneyed capital.

"70.11. **Property exempt from taxation.** The property in this section described is exempt from taxation, to-wit:

* * * * *

(10) All moneys or debts due or to become due to any person and all stocks and bonds, including bonds issued by any county, town, city, village, school district, or other political subdivision of this state, not otherwise specially provided for.

* * * * *"

APPENDIX F.

We here print a tabulation from the 1924 annual report of the Comptroller of the Currency showing approximately one-third of the investments of national banks indicated by italics (ours) consisting of bonds and notes issued by railroad, public service and miscellaneous corporations: (p. 44)

"(In Thousands of Dollars)

Domestic Securities

	June 30 1923	*June 30 1924*
State, county or other municipal bonds.	401,816	505,528
Railroad bonds	503,348	573,571
Other public service corporation bonds.	337,293	397,560
All other bonds	521,200	575,743
Claims, warrants, judgments, etc	90,252	90,594
Collateral trust and other corp. notes	135,235	105,933
Foreign government bonds	153,723	179,470
Other foreign bonds and securities	91,236	85,055
Stock, Federal reserve banks	71,862	72,318
Stocks, all other	69,892	74,778
Total	2,375,857	2,660,550
United States Government Securities	2,693,846	2,481,778
Total Bonds of all classes	5,069,703	5,142,328"